Office-Supreme Court, U.S.
FILED
MAY 26 1967
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

HERBERT SCNHEIDER,)
Appellant,) No. [redacted]196
v.)
WILLARD J. SMITH, Commandant,)
UNITED STATES COAST GUARD,)
Respondent.)

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Western District of Washington, Northern Division, entered on January 23, 1967, dismissing appellant's complaint with prejudice. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the district court is reported in 263 Fed. Supp. 496. It is set forth in the Appendix beginning at page 1a.

JURISDICTION

Appellant's complaint in the district court sought an injunction against the enforcement of the Magnuson Act, 50 U.S.C. § 191, which was being applied by Coast Guard regulations to keep appellant, a seaman, from sailing on United States merchant vessels of over 100 tons unless he would submit to a political interrogation. Jurisdiction of the district court was based upon 28 U.S.C. § 2282. Appellant applied for injunctive relief and a three-judge district court was convened pursuant to 28 U.S.C. § 2284. Jurisdiction in the district court also rested upon 28 U.S.C. § 2201 because appellant asked for a judgment declaring unconstitutional 50 U.S.C. § 191 and regulations issued thereunder and upon 28 U.S.C. § 1331, because the complaint alleged that respondent's actions had damaged appellant in excess of $10,000,[1/] and arose under the Constitution and laws of the United States.

The district court filed an opinion on January 23, 1967, which concluded with an order dismissing the complaint with prejudice ((R 254-2 55; Appendix p. 9a)). Notice of appeal from this order was filed in the United States District Court for the Western District of Washington on March 17, 1967. ((R 261.))

Jurisdiction of this court is invoked under 28 U.S.C. § 1253 to review the judgment of the three-judge district court denying relief. The following case sustains the jurisdiction of the Supreme Court on direct appeal: Aptheker v. Secretary of State, 378 U.S. 500.

1/ The pre-trial order in this case provided that "pursuant to stipulation of the parties the damage question is reserved until after determination of the constitutional questions of law by the three judge court and may be heard by a single judge." ((63)).

STATUTES INVOLVED

The statute here involved, the Magnuson Act, 50 U.S.C. § 191, reads as follows:

> "Regulation of anchorage and movement of vessels during national emergency.
>
> "Whenver the President by proclamation or executive order declares a national emergency to exist by reason of actual threat and war, insurrection, or invasion, or disturbance or threat in disturbance of international relations of the United States, the Secretary of Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel foreign or domestic, in the territorial waters of the United States; may inspect such vessels at any time, place guards thereon, and if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure observance of the rights andobligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.
>
> "Within the territory and waters of the Canal Zone the Governor of the Canal Zone, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury.
>
> "Whenever the President finds that the security of the United States is in danger by reason of actual threat and war, or invasion, or insurrection, or subversive activity, or of disturbances or threat and disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations --
>
> "(a) To govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the United States, to inspect such vessels at any time, to place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United

States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof;

"(b) To safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States. Any appropriation available to any of the Executive Departments shall be available to carry out the provisions of this chapter. June 15, 1917 c. 30 title II, Sec. 1, 40 Stat. 220; Aug. 9, 1950, c. 656, Sec. 1, 64 Stat. 427; Sept. 26, 1950, c. 1049, Sec. 2(b), 64 Stat. 1038."

QUESTIONS PRESENTED

I

Under the Magnuson Act as applied in this case through Coast Guard regulations virtually all seamen and other maritime workers, in order to work aboard ships and waterfront facilities, must be in possession of specially validated documents issued by the Coast Guard. Applying the act and regulations to appellant, the Coast Guard has refused to specially validate his documents, or to consider his application for such validation until he answers interrogatories under oath about his present or past membership in, or relationship to, organizations on the Attorney General's list, his activities on behalf of a newspaper called the "People's World", and his present attitude toward Communism and toward the form of government of the United States.

(1) As so applied, is the Magnuson Act: A bill of

attainder and ex post facto law prohibited by Article I, Section 9 of the Constitution?

(2) As so applied, is the Magnuson Act a constitutionally prohibited abridgment of freedom of speech, of the press, and of assembly?

(3) As so applied, does the Magnuson Act deny appellant due process because, under its authority the Coast Guard has prevented him from pursuing his calling as a ship's engineer --

(a) Applying standards so vague as to be incapable of ascertainment or understanding;

(b) Acting under regulations that make the arbitrary assumption that there is a correlation between the political associations or beliefs of an individual and the likelihood that he will engage in acts of sabotage;

(c) By requiring him to waive constitutionally protected rights to obtain consideration of his application;

(d) By creating and applying an irrebutable presumption that, in the absence of any derogatory information about appellant, his refusal to answer questions about his past political associations or his present political attitudes indicates that he is a security risk;

(e) By compelling him to seek special validation in an administrative proceeding that does not afford a fair hearing, review, or appeal.

II

Does the Magnuson Act authorize the maritime industry screening program applied in this case?

STATEMENT

Appellant is a qualified and licenses marine engineer who sailed on United States merchant vessels as a merchant seaman in various capacities between 1942 and 1949. Since 1949 he has engaged in non-maritime employment. [R 56]. In October 1964 he applied to the United States Coast Guard office in Seattle for renewal and validation of his merchant mariner's documents first issued to him in 1940. [R 56]. The Coast Guard refused to process his application or to issue the special validation of his merchant mariner's document required for his employment as a merchant seaman until he answered under oath questions about his present and past political activities and attitudes. [R 56, 57].

The regulations under which the Coast Guard claimed authority to act provided that "all licensed officers and certificated men who are employed on merchant vessels of the United States" of over 100 gross tons "must be holders of specially validated documents prescribed by the Commandant." (33 C.F.R. § 6.10-3, Appendix, p.12-13a and 33 C.F.R. § 121.01(a), Appendix, p. 16a infra.) Under these regulations "[n]o persons shall be issued [such] document ... unless the Commandant is satisfied that the character and habits of life of such a person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States. ..." (33 C.F.R. § 6.10-1, Appendix, p. 12a, infra.) To the same effect also is 33 C.F.R. § 121.07(a), Appendix, p. 21a, infra.

The standards set by the regulations "which may preclude a determination that" the applicant has the requisite character "relate" among other things to "[m]embership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended." (33 C.F.R. § 121.03, Appendix, p.19a infra.) [R 57, 66-68, 80-83]. Thus, such membership, affiliation, or association (whether past or present) may without more bar a maritime worker from private employment.

Appellant was required as part of his application to answer under oath the question: "Are you now, or have you ever been, a member of, or affiliated or associated with in any way any of the ..." approximately 300 organizations named by the Attorney General as "subversive". [R 80]. He answered "Yes", [R 80], and added in explanation: "I have been a member of many political and social organizations, including several named on this list. I cannot remember the names of most of them and could not be specific about any. To the best of my knowledge I have not been a member or participated in the activities of any of these organizations for ten years." [R 82].

The Coast Guard took no action of any kind on appellant's application until his attorney demanded an explanation for the delay and at the same time protested the use of the Attorney General's list as "an unreasonable criteria as a precondition of employment", violative of "constitutional standards". [R 64, 65]. A reply from the Coast Guard excused the delay on the grounds of appellant's "reluctance to furnish names and dates of his member-

[illegible] which have been designated

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by the Attorney General. ...", but "anticipated that action will be taken in the near future". [R 66]. Appellant's counsel again protested the use of the Attorney General's list as a part of the screening process and urged a speedy decision on the application. [R 67, 68]. The Coast Guard then sent a set of interrogatories to be answered under oath by appellant. These interrogatories, referring to his earlier statement that he had "been a member of many ... organizations, including several named on" the Attorney General's list, asked appellant to:

> "(a) List the names of the political and social organizations to which you have belonged, and location.
>
> "(b) Furnish approximate dates of membership.
>
> "(c) Furnish full particulars concerning the extent of your activities and participation in the organization (number and type of meetings; functions attended; positions or offices held; classes or schools attended; contributions made; etc.)
>
> "(d) Your reason for discontinuing the membership.
>
> "(e) Your present attitude toward the principles and objectives of the organizations." [R84]

The interrogatories also requested answers and a full explanation concerning the following:

> "Are you now or have you evern been a member of or affiliated with, in any way, the Communist Party, its subdivisions, subsidiaries or affiliates?
>
> "Have you at any time been a subscriber to the 'People's World'?
>
> "Have you at any time engaged in any activities in behalf of 'People's World'?
>
> "What is your present attitude toward the Communest Party?

"What is your present attitude toward the principles and objectives of Communism?

"What is your attitude toward the form of Government in the United States?" [R 85]

The interrogatories were accompanied by a form of oath which includes a warning that "any false statement may be punishable under § 1001, Title 18, United States Code." [R 84-86]. (18 U.S.C. § 1001 creates a felony, punishable by up to five years' imprisonment and $10,000 fine.)

Appellant, through his attorney, refused to answer these interrogatories, stating that it is "because of Mr. Schneider's commitment to the Constitution of this country and the Bill of Rights that he finds the questions so obnoxious" and that it is not he "who is subversive ..., but rather ... those who would insist that a matter of what a person reads or thinks is relevant to their dedication to the freedom principles for which this country stands". [R 71-73].

The Commandant of the Coast Guard, relying on the provision of 33 C.F.R. § 121.05(c)(2) that "[i]f an applicant fails or refuses to furnish the required information or fails or refuses to make full and complete answer with respect to all matters of inquiry, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes the required information and fully and completely answers all inquiries directed to him", advised that no further action would be taken on appellant's application. [R 70].

Appellant thereupon filed his complaint, petitioning for declaratory relief, for an injunction against enforcement of the Act in such a way that it would be impossible for him to pursue his calling as a seaman, and for damages.[2] [R 17]. Upon application, a three-judge court was designated, which heard the case on the pre-trial order filed September 30, 1966. [R]. The pre-trial order provided:

> "The defendant does not intend to contest the following facts at the trial by evidence to the contrary ... Plaintiff is now and always has been loyal to the United States of America ... Plaintiff has never committed any act of sabotage or espionage or any act inimical to the security of the United States of America."

The court filed its opinion, ordering dismissal of the complaint with prejudice on January 23, 1967. It is from this order of dismissal that the present appeal was taken on March 17, 1967.

THE QUESTIONS PRESENTED ON APPEAL ARE SUBSTANTIAL.

A. The questions presented potentially affect the employees of every industrial establishment in the United States.

The ruling of the court below authorizes a governmental agency to conduct a sweeping inquiry into the past and present political associations and beliefs of more than 130,000[3] maritime

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2/ See footnote 1, page 2, supra.

3/ In calendar-year 1965 50,894 seamen were employed on United States-flag vessels of 1000 gross tons and over, exclusive of vessels on inland waterways, the Great Lakes, and exclusive of United States government-owned vessels. Table 887, p. 607, "Statistical Abstract of the United States 1966" (Department of Commerce, Bureau of the Census). Employment figures for the category of United States-flag vessels between 100 gross tons (theminimum gross tonnage covered by the Magnuson Act and the regulations) and 1000 gross tons are not readily available from official publications, but the number of such vessels is in excess of 11,000. Table 895, p. 611, "Statistical Abstract of the United States, 1966". (continued on p. 11)

and dockside workers. These employees of private employers [4] are required as a condition of their initial or continued employment to answer questions under penalty of perjury [5] covering a broad range of political affiliations and a wide spectrum of political attitudes and beliefs, such as the questions put to appellant and described above, pp.

If the protection of merchant ships and port facilities justifies screening employees by means of a test of their political beliefs because "there is a vital governmental interest at stake in preventing loss and injury to vessels, ports, and harbors of the Merchant Marine through sabotage and other subversive acts", [6] then the same reasoning would justify extension of such screening to all the transportation industries, to every industrial facility, should Congress so decide, and indeed even to those using streets and highways where goods needed in defense plants may pass to become targets of sabotage. Thus, the implications of the decision below vitally

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As of early 1966, the Coast Guard was receiving some 2300 requests each month for original documents for seamen; testimony of Capt. Lynn Parker, U.S.C.G., Chief of the Merchant Vessel & Personnel Division of the Coast Guard, at p. 9, "Maritime Manpower Shortage", Doc. H.R. 89-30. At this rate, the Magnuson Act and the Coast Guard regulations are applied to some 28,600 more maritime workers each year.

In addition, the Coast Guard applies virtually identical screening procedures (33 C.F.R. 125.01 et seq.) to laborers in the longshoring labor pool, which included about 88,000 men in 1965. See 1965 annual report of the U.S. Maritime Commission at p. 39.

The screening procedures have thus probably been applied to over a quarter-million workers in the 16 years of the Act's existence.

4/ "Of the Federal Government Security programs only one involves persons who are not seeking some action or advantage from the government. That program is the one governing the security of vessels and waterfront facilities. ..." Communist Security & Loyalty, 51.1.

5/ 18 U.S.C. § 1001, [R 8-36]. See Note 1/ supra, p. 2.

6/ Opinion of the Court below, Appendix, pp. 7-8, infra.

affect every citizen in the United States whose occupation or activities take him to any facility which the Congress or the State Legislatures (Cf. Lerner v. Casey, 357 U.S. 468) may deem vital to the "national defense". Appellant has refused to acknowledge that government has, constitutionally, so broad a right to inquire into the past or present political attitudes of private citizens as a condition to their employment in a lawful private occupation. His constitutional claim deserves examination by this court.

B. The constitutional questions are substantial.

1. Abridgement of freedom of speech, press, assembly, and association.

The operation of this broad-scale screening program must inevitably have a "chilling effect" upon the exercise of First Amendment rights by maritime and dockside workers. (Cf. Dombrowski v. Pfister, 380 U.S. 749. Many seamen and longshoremen desirous of continuing their employment, would "steer far wider of the unlawful zone ..." Speiser v. Randall, 357 U.S. 513, 526, and thus would seek to avoid any political opinion or association with any group or reading of any newspaper which might dissatisfy the particular Commandant of the Coast Guard administering the program. The substantiality of this threat to First Amendment freedoms, which "need breathing space to survive", NAACP v. Button, 371 U.S. 415, 438, is not diminished because appellant is a seaman rather than a teacher.

The court has suggested that teachers have a right to freedom of inquiry that may not be abridged by test oaths and by

official sanctions imposed upon membership in political organizations. Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966). We recognize the importance of freedom in academic life, but we suggest that the principles of Keyishian and Elfbrandt are and ought to be no less applicable to persons in other endeavors. First Amendment rights are personal, not occupational. The rights of seamen and longshoremen to exercise of First Amendment freedoms were at issue in DeJonge v. Oregon, 299 U.S. 353 (1937), where the Court struck down criminal punishment for peaceful and lawful political activities. In Baggett v. Bullitt, 377 U.S. 300 (1964), although teachers were included among the plaintiffs, the vague and threatening attack on free speech there struck down applied to all State employees. In Dombrowski v. Pfister, 380 U.S. 479 (1965), this court granted injunctive relief against abridgement of the First Amendment rights of two lawyers and the executive director of a civil-rights group.

Workers in the maritime and stevedoring industries have historically been in the forefront of organized labor and social reform. The industries have produced such well-known intellectuals as the novelists Joseph Conrad and Jack London and the philosopher Eric Hoffer. Intellectual life and social controversy are no strangers to the maritime industries.

The exercise of First Amendment freedoms is doubly threatened in Coast Guard "screening" programs: First, merely as a condition of participating in the administrative procedures of

the Coast Guard one is required to submit answers under oath, to extensive questions about exercise of protected rights. Second, evidence of the exercise of those rights may be sufficient to bar one from employment; the Coast Guard is authorized by 33 C.F.R. § 121.03(a), Appendix, p. 19a, to do what Arizona was prevented from doing in Elfbrandt v. Russell, 384 U.S. 11 - bar one from employment by "guiltless knowing behavior". (Cf. Aptheker v. Secretary of State, 378 U.S. 500.)

2. Due process.

The due process questions in this case are complementary to those presented in McBride v. Roland, 369 F.2d 65, (2d Cir. 1966), petition for certiorari, sub. nom. McBride v. Smith, No. 1105, filed March 1, 1967. In that case the applicant was disqualified after a hearing. The basis of that action by the Commandant was McBride's past membership in the Communist party and the claim that some of his answers on the original application were false. In this case appellant's disqualification is made without any hearing and results from his refusal to submit to what he viewed as an unconstitutional procedure.

First, the standards upon which his application was to be judged involved such vague and undefined terms as "inimical to security", "sympathetic association", and "sufficient information ... to satisfy [the Commandant] ..." as to "the character and habits of life" of the applicant. The special interrogatories put to appellant [R84-85] are even vaguer. The answers to these inquiries may be taken by the Coast Guard as sufficient to bar appellant from his vocation, and they are to be completed under the threat

of perjury. What standards will be applied to answers to such questions as, "What is your attitude toward the form of government in the United States?"? In preparing his application, or answering such interrogatories appellant is entitled to know with more precision than this what he is being asked to respond to and what are the relevant standards. (Cf. O'Connor v. U.S., 99 App. D.C. 373, 240 F.2d 404 (1956); U.S. v. Lattimore, 94 App. D.C. 268, 215 F.2d 847 (1954); Watkins v. U.S., 354 U.S. 178 (1957).

Second, appellant has had no hearing upon his application for the necessary Coast Guard validation because he has refused to permit the intrustion of a governmental official into his affairs to determine whether his political beliefs, attitudes and associations are sufficiently orthodox to justify his further employment as a seaman. His refusal to answer the special interrogatories has resulted in the application of the sanction of Section 121.05(d)(1) and (2). (Appendix, pp. 20a-21a). His application has in effect been rejected by the Commandant, who has held it "in abeyance ... until the applicant furnishes" the desired information under oath and under penalty of perjury. Applicant's refusal to permit disclosure of his political beliefs is constitutionally protected by that "constitutional doctrine which ... emerged since" Adler v. Board of Education, 342 U.S. 485. This doctrine rejected the "premise ... that public employment ... may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action", Kevishian v. Board of Regents of N.Y., 385 U.S. at 605. The Commandant conditions further consideration of appellant's application (and

thus, his right to employment, upon his surrender of his constitutional right to immunity from inquisitorial governmental intrusion into his private beliefs, and convictions and an inquiry into the details of his past political associations.

This case, then, raises the substantial constitutional question whether the doctrines of Keyishian v. Board of Regents, and the cases upon which it rests apply to governmental acts that condition private employment upon surrender of constitutional rights.

Third, the basic twin concepts upon which the screening program rests, that there is some direct and inevitable correlation between political association and beliefs and a proclivity for sabotage, and that one who refuses to permit an inquiry into his political beliefs and associations is a danger to security, have been undermined in the recent decisions of this court in Baggett v. Bullitt, 377 U.S. 360, and Elfbrandt v. Russell, 384 U.S. 11, Cf. Aptheker v. Secretary of State, 378 U.S. 500. As was said in Bailey v. Alabama, 219 U.S. 219 at 239 (1911) (quoted with approval in Speiser v. Randall, 357 U.S. 513 at 526 (1958)),

> "The power to create presumptions is not a means of escape from constitutional restrictions."

Fourth, the Coast Guard's regulations put the burden of proof, i.e., the burden of persuasion, upon the appellant. He must satisfy the Commandant that he is not dangerous, 33 C.F.R. § 121.07, Appendix, p. 20a. If his application is rejected, he must then also bear the burden of production of evidence. The teaching of Speiser is that the shifting of the burdens in this way is impermissible where the applicant is being required to

justify his exercise of First Amendment rights.

Fifth, a substantial constitutional issue is presented as to whether the Coast Guard regulations afford a fair hearing or a fair review. The hearing boards are authorized by 33 C.F.R. § 121.19(f), (Appendix, pp. 26a-27a), to take into consideration "undisclosed information" from "confidential sources" without requiring supporting witnesses to appear before the board for cross-examination. These failures to insure the applicant's right to a confrontation of witnesses and to a full understanding of the charges against him were involved in Parker v. Lester, 227 F.2d 708 (Cir. 9, 1955), where the then-existent screening program was stricken down. Subsequent to that decision, the board was enjoined that "[e]very effort should be made to produce material witnesses".(33 C.F.R. § 121.19(f)) and that if "the applicant ... is, or may be, handicapped by the non-disclosure to him of confidential sources, or by the failure of witnesses to appear, the Hearing Board shall take the fact into consideration." 33 C.F.R. § 121.19(h), (Appendix, p. 27a).

These changes do not correct the constitutional infirmities noted in Parker v. Lester. Cf. Greene v. McElroy, 360 U.S. 474. Taken together, the regulations fail to afford procedural due process; applicants can have no assurance that they will receive fair initial hearings or reviews based upon records fairly made.

3. Bill of Attainder.

The screening program as applied in this case rests in part upon the use of the Attorney General's list of subversive organizations as a means of determining whether a seaman or ship's

officer shall be qualified for employment. The "standards" set forth in 33 C.F.R. § 121.03 (Appendix, p.19a) specifically provide that a factor which "may preclude" qualification of a seaman is "membership in or affiliation or sympathetic association with" an organization on the Attorney General's list. The regulations thus give the Commandant the right to exclude an applicant solely on the basis of membership in, or affiliation or association with, an organization on the list. This procedure, if authorized by Congress, as the lower court held it had been, bears the earmarks of a bill of attainder.

In Lovett v. U.S., 328 U.S. 303, the court held that legislative exclusion of named people from public employment violated the prohibition against bills of attainder. In Cummings v. Missouri, 4 Wall. (U.S.) 356, 18 L.Ed. 356, and in Ex parte Garland, 4 Wall. (US.) 333, 18 L.Ed. 366, it was held that legislative exclusions of classes of persons from private employment (Cummings had been barred from acting as a priest and Garland sought readmission to the bar of the U.S. Supreme Court) were in each instance bills of attainder. It was intimated by Mr. Justice Black in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 at 143-44, that the proscription of named organizations by executive action has the characteristics of a bill of attainder. In Brown v. U.S., 381 U.S. 437, the court struck down as a bill of attainder an act making it unlawful for one to serve as an employee or officer of a labor union if one was a member of a legislatively named organization.

Thus, the prohibition against bills of attainder forbids the legislature to bar one from public or private employment

by reason of membership in a proscribed organization. If the Legislature were to name 250 organizations, rather than one, the act would nonetheless be a bill of attainder.

Here, the executive, claiming to act under Congressional authority, the Magnuson Act, asserts the right to exclude persons from private employment because of membership in (or affiliation or association with) any of a large number of organizations that have been named by the executive, also under asserted Congressional authority. If Congress had in terms named all the organizations on the Attorney General's list and then barred past or present members thereof from private maritime employment, such an enactment would have been a bill of attainder. Brown v. U.S., supra. May the Congress delegate to the executive a power that the Constitution forbids the Congress itself to exercise? As was said in Brown v. U.S.,

> "In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics." (381 U.S. at 455)

The Commandant has attempted precisely to use membership in the organizations on the list as such an equivalent expression.

C. The question of whether the Magnuson Act Authorizes the screening procedures here involved should be determined by this Court.

The stated purpose of the Magnuson Act is to safeguard shipping and port facilities against physical destruction, loss, or injury "from sabotage or other subversive acts, accidents, or other causes of similar nature." The Act authorizes

"rules and regulations governing the anchorage and movement of any vessel" inspection of "such vessels at any time" and removal from such vessels of "all persons not specially authorized ... to go or remain on board." The clear implication is that the President is so authorized only pursuant to taking "full possession and control" of a vessel. There is no suggestion in the wording of the Act that its framers intended to authorize the type of sweeping political inquiries that have been directed to the appellant in this case or to seamen, longshoremen, and stevedores generally. Since the Coast Guard screening program clearly impinges upon rights protected by the First Amendment, "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms" is required, (NAACP v. Button, 371 U.S. 415, 438.) Thus, if Congress had intended to establish a legislative equivalence between certain political beliefs or activities and a disposition to cause physical harm to shipping facilities, it must be presumed that the legislation would have been drawn with precision to define and limit such intended equivalence with sharp and clear definitions. The court has previously held that it will not assume that security clearance programs that fail to afford full due process have been authorized.

> "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." Greene v. McElroy, 360 U.S. 474 at 507.

See also Peters v. Hobby, 349 U.S. 331, and Cf. Kent v. Dulles, 357 U.S. 116.

In view of the substantiality of the questions presented, the court should note probable jurisdictions.

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APPENDIX

OPINION OF COURT BELOW

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HERBERT SCHNEIDER, Plaintiff, vs. E. J. ROLAND, Commandant, United States Coast Guard, Defendant.	NO. 6553 OPINION

Before: JERTBERG, Circuit Judge, and LINDBERG and BEEKS, District Judges.

BEEKS, District Judge:

This case presents once more the perennial but difficult problem of striking a balance between the protection of individual liberties and the security of the United States.

Plaintiff, who holds a valid license to serve as a second assistant engineer on steam vessels, applied to the Coast Guard in Seattle in October of 1964 for the validation of his mariner's certificate. This validation by law is a prerequisite to his employment aboard a ship of more than 100 gross tons in the U.S. Merchant Marine. As part of that application, he completed a

questionnaire relating to his loyalty to the government of the United States.[1] In March of 1965, the Coast Guard informed plaintiff that his questionnaire "does not contain, in the judgment of the Commandant, sufficient information for a determination with respect to your eligibility," and sent him a set of interrogatoreis to answer in writing and under oath.[2] Plaintiff was informed that, "No further action will be taken on your application until your reply is received at this Headquarters."

Plaintiff, through his counsel, replied that requiring him to answer the interrogatories violated his constitutional rights, inasmuch as, "it can be none of the government's business what he reads or what he thinks." He refused to answer the interrogatories, and demanded that his certification be granted.[3] The Coast Guard, pursuant to its regulations, has held plaintiff's application in abeyance ever since, refusing either to deny it or to grant it until such time as plaintiff answers the interrogatories. Plaintiff filed this action, requesting a declaration of the unconstitutionality of the legislation, executive orders, and regulations governing the Coast Guard's procedures in this case; a mandatory injunction requiring defendant to approve his application and to refrain from interfering with his employment aboard United States flag vessels; and damages in excess of $10,000.[4] Jurisdiction is vested in this court by virtue of the challenge to Congressional legislation and the request for an injunction against its enforcement.

The Magnuson Act, 40 Stat. 220 (1917), as amended by 64 Stat. 427 (1950), 50 U.S.C. § 191 (1952), provides in

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relevant part:

> "Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of distrubances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations -
> * * *
> "(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States."

On October 18, 1950, pursuant to the authority granted him by the Magnuson Act, the President issued Executive Order No. 10173. As amended by Executive Orders No. 10277 and 10352, subpart 6.10-1 of that order provides:

> §6.10-1. Issuance of documents and employment of persons aboard vessels. No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States: Provided, that the Commandant may designate categories of merchant vessels to which the foregoing shall not apply. (Exec. Order No. 10352, 17 Fed. Reg. 4607 (1952)).

Regulations promulgated by the Coast Guard pursuant to this Executive Order and published in 33 C.F.R. § 121 establish the machinery of the screening program. Included among those regulations are the following:

> §121.03 Standards.
>
> Information concerning an applicant for special validation endorsement for emergency service, or a holder of such endorsement, which may preclude a determination that his character and habits of life

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are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, shall relate to the following: * * *

(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended.

§ 121.05 Applications.

* * *

(d) (1) If, in the judgment of the Commandant, an application does not contain sufficient information to enable him to satisfy himself that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant may require the applicant to furnish, under oath in writing or orally, such further information as he deems pertinent to the standards set forth in §121.03 and necessary to enable him to make such a determination.

(2) If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

Other provisions in the regulations require that when the Commandant denies an application for a special validation certificate, he must give written notice to the applicant along with a statement of the reasons for his so doing. In addition, the regulations provide for a hearing on the Commandant's ruling, and for appeal.

Plaintiff takes the position that in passing the Magnuson Act, Congress did not intend to authorize the creation of a personnel screening program. With this we cannot agree. The Magnuson Act grants to the executive branch the authority to make rules and regulations for the explicit purpose of safeguarding against sabotage and other subversive acts. An

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appropriate if not essential component of a code of rules and regulations designed to achieve that objective is an effort to insure that those persons sailing aborad vessels in the merchant marine are not politically notivated to commit acts of sabotage and destruction. Cases arising under the Magnuson Act have consistently so held: Parker v. Lester, 227 F 2d 708 (9th Cir. 1955); United States v. Gray, 207 F 2d 237 (9th Cir. 1953); McBride v. Roland, No. 30331, 2d Cir., Nov. 23, 1966. Counsel contends that merchant seamen spend their professional lives at sea, many of them, such as plaintiff, in the bowels of commercial vessels, having no access to classified information and therefore constituting no threat to national security. We find this a flagrant non sequitur, for it is hard to imagine a more strategic location for purposes of sabotage of vessels, harbors, ports, and waterfront facilities than in the bowels of deep-draft vessels.[5]

We turn, then, to the contention that requiring plaintiff to supply the information demanded infringes upon his constitutional freedoms of speech, belief, and association, and upon his right to enjoy the benefits of freedom of the press. In Konigsberg v. State Bar of California, 366 U.S. 36 (1961), the United States Supreme Court upheld the rejection of an application for admission to the state bar where the applicant had refused to answer questions pertaining to his membership and participation in the Communist Party. In rejecting the same contention as is made in this case, the Court stated:

> ". . . general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been

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regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. [citations omitted] It is in the latter class of cases that this Court has always placed rules compelling disclosure of prior association as an incident of the informed exercise of a valid governmental function. [citation omitted]. Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved. [citations omitted] (366 U.S. at 50-1)."

In American Communications Association v. Douds, 339 U.S. 382 (1950), the Supreme Court upheld a requirement that each officer of a labor union utilizing the opportunities afforded by the Management Labor Relations Act must file an affidavit that he is not a member of the Communist Party and does not subscribe to certain of its principles. In response to the challenge that this requirement was an unconstitutional abridgment of free speech, the Supreme Court held:

"When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." (339 U.S. at 399).

The Court concluded:

"We must, therefore, undertake the 'delicate and difficult task. . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.'" [citation omitted]. (339 U.S. at 400).

There can be little question that there is a vital governmental interest at stake in preventing loss and injury to vessels, ports, harbors, and waterfront facilities of the

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merchant marine through sabotage and other subversive acts. The merchant marine, sometimes termed this nation's "fourth arm of defense," shoulders much of the burden of logistical support for the armed forces. The vital governmental interest to be served by a program which screens its personnel is clear. But plaintiff charges that the information which the Commandant seeks to elicit from him is not relevant to the protection of that interest, and that therefore the abridgment of free speech and association which the questions entail is not within the protection afforded by the program's lawful purpose.

The bulk of the information required by the Commandant, and which plaintiff refused to supply, relates to his membership and activities in the Communist Party and other organizations dedicated to the overthrow of the Government of the United States by the use of force and violence. The extent to which plaintiff subscribes to those principles, as reflected by his membership and participation in those organizations, must be regarded as a highly relevant line of inquiry in determining whether his presence aboard merchant marine vessels would be inimical to the security of the United States. In McBride v. Roland, supra, a recent decision bearing a close resemblance to the case at bar, the Court of Appeals for the Second Circuit upheld the Commandant's rejection of an application for validation where the information supplied by the applicant indicated he had been an active participating member of the Communist Party. The Court held:

> "The screening program is not unreasonable. The merchant marine, although involving private employment, is vulnerable to sabotage and

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> espionage, and is obviously a sensitive area of employment of vital importance to the national defense.... In the case before us we have at issue the reasonableness of regulation of employment in a peculiarly sensitive area of those who are knowing members and the nature of whose membership activities makes it likely that their presence would be inimical to the United States. As interpreted and applied to the facts here we find nothing unreasonable in the regulations."

Plaintiff requests that this Court order the Commandant to make a final disposition of his application for a special validation, either denying it or granting it. Holding the application in abeyance, plaintiff contends, has the evils of a formal denial without its concomitant virtues. It deprives him of the right to earn his living as a merchant seaman; and yet denies him the hearing and appeal to which he would be entitled were his application formally denied. Plaintiff recognizes that the Coast Guard regulations (33 C.F.R. §121.05 (d)(2), supra) specifically authorize the Commandant to hold his application in abeyance, but contends that the regulation is not authorized by Congress and is an unconstitutional denial of procedural due process.

In support of this contention, plaintiff cites Graham v. Richmond, 272 F 2d 517 (D.C. Cir. 1959), where a divided court held that in the absence of express regulatory authority the Commandant of the Coast Guard could not refuse further consideration to the application for validation of a seaman who refused to answer certain interrogatories similar to those in this case. But the Graham decision antedated (and perhaps gave rise to) the promulgation of the regulation which governs this case. The absence of regulatory authority found the basis for the decision in Graham; and its presence in this case must similarly be determinative.

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Moreover, we cannot agree that the regulation, as applied to plaintiff, is unreasonable. The interrogatories which he refused to answer sought information so relevant to the purposes of the screening program that plaintiff was not privileged to refuse to answer. Where he nevertheless refuses to do so, we do not feel that due process entitles him to the formal denial and to the hearing and appeal which could follow. We make no finding, however, as to whether plaintiff is or is not qualified for validation as a mariner. We are unable to do so for the same reason that the Commandant has not: plaintiff has refused to provide the raw materials for such a decision. He is not entitled to definitive action on his application until he does so.

Other contentions raised plaintiff, including the allegation that the Commandant's interrogatories were unconstitutionally vague, are without substantial merit, and are not worthy of extended discussion.

Complaint dismissed with prejudice.

Dated this 23rd day of January, 1967.

/s/ GILBERT H. JERTBERG
United States Circuit Judge

/s/ WILLIAM J. LINDBERG
United States District Judge

/s/ WILLIAM T. BEEKS
United States District Judge

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FOOTNOTES

1/ The relevant questions thereon and plaintiff's answers are:

Q. "Item 6. Are you now, or have you ever been, a member of, or affiliated or associated with in any way, any of the organizations set forth below? (Answer 'yes' or 'no'). If your answer is 'yes,' give full details in Item 7."

A. Yes.

[The questionnaire then set forth a list of the names of several hundred organizations. This list, commonly known as the "Attorney General's list," was compiled and issued pursuant to Executive Order No. 10450.]

Q. "Item 7. (Use this space to explain items 1 through 6. Show item numbers to which answers apply. Attach a separate sheet if there is not enough space here.)"

A. "I have been a member of many political and social organizations, including several named on this list. I cannot remember the names of most of them and could not be specific about any. To the best of my knowledge, I have not been a member or participated in the activities of any of these organizations for ten years."

2/ Those interrogatories inquired as to plaintiff's membership and participation in the organizations on the "Attorney General's list"; his present attitudes toward the Communist Party, the principles and objectives of Communism and the form of government in the United States; and whether he at any time had

been a subscriber to a publication known as, "The People's World," or had at any time engaged in any activities in its behalf.

3/ In the same letter, counsel indicated that from approximately 1940 to 1950 plaintiff was a member of the Communist Party and of other organizations on the "Attorney General's list," and had subscribed to "The People's World"; but that he fundamentally disagreed "with techniques and methods utilized by the Communist Party and by organizations which it controlled."

4/ With respect to plaintiff's claim for damages, the pre-trial order provided: "Pursuant to stipulation of the parties the damage question is reserved until after determination of the constitutional questions of law by the three judge Court and may be heard by a single judge."

5/ An illustration of this fact, occurring in recent weeks, is the explosion of a time bomb in the engine room of a Liberian freighter, the GRAND INTEGRITY, on November 13, 1966, just after the ship had entered into international waters from the Columbia River. The explosion killed two, including the master, and injured seven others.

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APPENDIX

33 C.F.R. - NAVIGATION AND NAVIGABLE WATERS

Chapter 1 - Coast Guard, Department of the Treasury

Subchapter A - General

PART 6 - PROTECTION AND SECURITY OF VESSELS, HARBORS, AND WATERFRONT FACILITIES

Subpart 6.10 - Identification and Exclusion of Persons From Vessels and Waterfront Facilities.

§ 6.10-1 Issuance of documents and employment of persons aboard vessels.

No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States: Provided, That the Commandant may designate categories of merchant vessels to which the foregoing shall not apply. [E.O. 10352, 17 F.R. 4624, May 21, 1952]

§ 6.10-3 Special validation of merchant marine documents.

The Commandant may require that all licensed officers and certificated men who are employed on other than the exempted

designated categories of merchant vessels of the United States be holders of specially validated documents. The form of such documents, the conditions, and the manner of their issuance shall be as prescribed by the Commandant. The Commandant shall revoke and require the surrender of a specially validated document when he is no longer satisfied that the holder is entitled thereto.

§ 6.10-5 Access to vessels and waterfront facilities.

Any person on board any vessel or any person seeking access to any vessel or any waterfront facility within the jurisdiction of the United States may be required to carry identification credentials issued by or otherwise satisfactory to the Commandant. The Commandant may define and designate those categories of vessels and areas of the waterfront wherein such credentials are required.

§ 6.10-7 Identification of credentials.

The identification credential to be issued by the Commandant shall be known as the Coast Guard Port Security Card, and the form of such credential, and the conditions and the manner of its issuance shall be as prescribed by the Commandant after consultation with the Secretary of Labor. The Commandant shall not issue a Coast Guard Port Security Card unless he is satisfied that the character and habits of life of the applicant therefor are such as to authorize the belief that the presence of

such individual on board a vessel or within a waterfront facility would not be inimical to the security of the United States. The Commandant shall revoke and require the surrender of a Coast Guard Port Security Card when he is no longer satisfied that the holder is entitled thereto. The Commandant may recognize for the same purpose such other credentials as he may designate in lieu of the Coast Guard Port Security Card. [E.O. 10277, 16 F.R. 7541, Aug. 2, 1951]

§ 6.10-9 Appeals.

Persons who are refused employment or who are refused the issuance of documents or who are required to surrender such documents, under this subpart, shall have the right of appeal, and the Commandant shall appoint Boards for acting on such appeals. Each such Board shall, so far as practicable, be composed of one Coast Guard officer, one member drawn from management, and one member drawn from labor. The members drawn from management and labor shall, upon suitable security clearance, be nominated by the Secretary of Labor. Such members shall be deemed to be employees of the United States and shall be entitled to compensation under the provisions of section 15 of the Act of August 2, 1946 (5 U.S.C. 55a) while performing duties incident to such employment. The Board shall consider each appeal brought before it and, in recommending final action to the Commandant, shall insure the appellant all fairness consistent with the safeguarding of the national security.

APPENDIX

33 C.F.R. - NAVIGATION AND NAVIGABLE WATERS

Chapter 1 - Coast Guard, Department of the Treasury

Subchapter K - Security of Vessels

[CGFR 56-12]

PART 121 - SPECIAL VALIDATION ENDORSEMENT FOR EMERGENCY SERVICE FOR MERCHANT MARINE PERSONNEL

By virtue of the authority vested in me as Commandant, United States Coast Guard, by Executive Order 10173, as amended, Part 121 is amended to read as follows:

Sec.

121.01 Requirement for special validation endorsement.

121.03 Standards.

121.05 Applications.

121.07 Approval of applicant by Commandant.

121.09 Holders of special validation endorsement.

121.11 Notice by Commandant.

121.13 Hearing Boards.

121.15 Notice by Hearing Board.

121.17 Challenges.

121.19 Hearing procedure.

121.21 Action by Commandant.

121.23 Appeals.

121.25 Action by Commandant after appeal.

121.27 Outstanding endorsements and applications.

121.29 Applications previously denied.

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AUTHORITY: §§ 121.01 to 121.29 issued under Sec. 1, 40 Stat.220, as amended; 50 U.S.C. 191; E.O. 10173, 15 F.R. 7005, 3 CFR, 1950 Supp., E.O. 10277, 16 F.R. 7537, 3 CFR, 1951 Supp., E.O. 10352, 17 F.R. 4607, 3 CFR, 1952 Supp. Interpret or apply: R.S. 4517, as amended, 4518, as amended, secs. 19, 223 Stat. 58, 118 as amended, sec. 7, 49 Stat. 1936, as amended; 46 U.S.C. 570, 571, 572, 2, 689.

§ 121.01 Requirements for special validation endorsement.

(a) Except as otherwise provided in this section no person shall be employed on a merchant vessel of the United States of 100 gross tons or over unless he is in possession of a Merchant Mariner's document bearing a special validation endorsement for emergency service.

(b) The vessels described in paragraph (a) of this section include those at anchor or made fast to a dock, but not those laid up or dismantled or out of commission.

(c) By "employed" and "employment" is meant the engagement of any person to fill any licensed or certificated berth on board ship whether or not under articles and includes those engaged for standby, relief, or other capacities.

(d) The following terms and conditions shall apply with respect to the employment of any person as a replacement or addition in the crew of any vessel described in paragraph (a) of this section at foreign ports when persons in possession of documents bearing a special validation endorsement for emergency service are not available as established to the satisfaction of the United States consular representative of the area:

(1) A person in possession of a United States seaman's

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document not bearing a special validation endorsement for emergency service may be employed only after approval of the Commandant is obtained by the United States consular representative for the area or by the master of the vessel.

(2) A person who is a United States citizen and who is not in possession of a United States seaman's document may be employed if no person specified in subparagraph (1) of this paragraph is available as established to the satisfaction of the United States consular representative for the area, and then only after approval of the Commandant is obtained by the United States consular representative for the area or by the master of the vessel.

(3) A person who is not a citizen of the United States and who is not in possession of a United States seaman's document may be employed only if no person as specified in subparagraphs (1) and (2) of this paragraph is available as established to the satisfaction of the United States consular representative for the area and then only after the following terms and conditions are met:

(i) No such person shall be employed unless he presents evidence of temporary clearnace from the United States consular representative for the area;

(ii) In no case shall the number of such persons employed on any one vessel exceed ten (10) percent of the total complement of the vessel, unless it is established to the satisfaction of the United States consular representative for the area that it is necessary to exceed this percentage to avoid delay to the sailing of the vessel or that the employment of persons with

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special qualifications as additional crew members is necessary in the vessel's operations; and

(iii) No such person shall be employed to fill the berth of a licensed officer or registered staff officer, except that if no radio officer is available as established to the satisfaction of the United States consular representative for the area, a person may be employed as radio operator in accordance with the provisions of Article 24, section 2, of the International Telecommunications Convention (Atlantic City, 1947), which reads as follows:

2. (1) In the case of complete unavailability of the operator in the course of a sea passage, a flight or a journey, the master or the person responsible for the station may authorize, solely as a temporary measure, an operator holding a certificate issued by the government of another country member of the Union [Footnote: The term "Union" means those countries which are parties to the International Telecommunications Convention] to perform the radio communication service.

(2) When it is necessary to employ as a temporary operator a person without a certificate or an operator not holding an adequate certiciate, his performance as such must be limited solely to signals of distress, urgency and safety, messages relating thereto, messages relating directly to the safety of life, urgent messages relating to movement of the ship and essential messages relating to the navigation and safe movement of the aircraft. Persons employed in these cases are bound by the provisions of 508 regarding the secrecy of correspondence.

(3) In all cases, such temporary operators must be

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replaced as soon as possible by operators holding the certificate prescribed in Sec. 1 of this article.

§ 121.03 Standards. Information concerning an applicant for special validation endorsement for emergency service, or a holder of such endorsement, which may preclude a determination that his character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, shall relate to the following:

(a) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means.

(b) Commission of, or attempts or preparations to commit, an act of espionage, sabotage, sedition or treason, or conspiring with, or aiding or abetting another to commit such an act.

(c) Performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the United States.

(d) Deliberate unauthorized disclosure of classified defense information.

(e) Membership in, or affiliation or sympathetic association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended.

§ 121.05 Applications. (a) Any person legally holding a current valid license or certificate, or an applicant for such a document, may make application at any Coast Guard Marine Inspection Office for a special validation endorsement for emergency service.

(b) Each Marine Inspection Office shall forward promptly

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to the Commandant each application for a special validation endorsement received by it.

(c)(1) Application for special validation endorsement shall be made under oath in writing and shall include applicant's answers in full to inquiries with respect to such matters as are deemed by the Commandant to be pertinent to the standards set forth in § 121.03, and to be necessary for a determination whether the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States.

(2) If an applicant fails or refuses to furnish the required information or fails or refuses to make full and complete answer with respect to all matters of inquiry, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes the required information and fully and completely answers all inquires directed to him.

(d)(1) If, in the judgment of the Commandant, an application does not contain sufficient information to enable him to satisy himself that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant may require the applicant to furnish, under oath in writing or orally, such further information as he deems pertinent to the standards set forth in § 121.03 and necessary to enable him to make such a determination.

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(2) If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

(e) Upon receipt, the application and such further information as the Commandant may be required shall be referred, except in those instances where action on an application is held in abeyance pursuant to paragraphs (c)(2) or (d)(2) of this section, to a committee composed of a representative of the Legal Division, of the Merchant Vessel Personnel Division, and of the Intelligence Division, Coast Guard Headquarters. The committee shall prepare an analysis of the available information and shall make recommendations for action by the Commandant.

§ 121.07 Approval of applicant by Commandant. (a) If the Commandant is satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will direct that a special validation endorsement be entered on the applicant's Merchant Mariner Document.

(b) If the Commandant is not satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will notify the applicant in writing as provided for in § 121.11.

§ 121.09 Holders of special validation endorsement. (a) Whenever the Commandant is not satisfied that the character

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and habits of life of a holder of a document bearing a special validation endorsement are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will request the holder to furnish under oath in writing such information as he deems pertinent to the standards set forth in § 121.03 and necessary for a determination on this issue.

(b) If the holder fails or refuses to furnish such information within thirty (30) days after receipt of the Commandant's request, the Commandant may issue the written notice provided for in § 121.11(a).

(c) The holder's failure or refusal to furnish such information shall preclude a determination that the holder's character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States.

(d) Upon receipt of such information as the Commandant may have required, the procedure prescribed in § 121.05(e) shall be followed.

(e) If the Commandant is satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall notify the holder accordingly.

(f) If the Commandant is not satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he

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shall notify the holder in writing as provided for in § 121.11.

§ 121.11 Notice by Commandant. (a) The notice provided for in §§ 121.07 and 121.09 shall contain a statement of the reasons why the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States. Such notice shall be as specific and detailed as the interests of national security shall permit and shall include pertinent information such as names, dates, and places in such detail as to permit reasonable answer.

(b) The applicant or holder shall have 20 days from the date of receipt of the notice of reasons to file written answer thereto. Such answer may include statements or affidavits by third parties or such other documents or evidence as the applicant or holder deems pertinent to the matters in question.

(c) Upon receipt of such answer the procedure prescribed in § 121.05 (e) shall be followed.

(d) If the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document or, in the case of a holder, notify him accordingly.

(e) If the Commandant is not satisfied that the applicant't or holder's character and habits of life are such as to

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warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall refer the matter to a Hearing Board for hearing and recommendation in accordance with the provisions of this part.

§ 121.13 Hearing Boards. The Commandant may establish a Hearing Board in each Coast Guard District. The Commandant shall designate for each Hearing Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a second member from a panel of persons representing labor named by the Secretary of Labor, and a third member from a panel of persons representing management named by the Secretary of Labor.

§ 121.15 Notice by Hearing Board. Whenever the Commandant refers a matter to a Hearing Board, the Chairman shall:

(a) Fix the time and place of the hearing;

(b) Inform the applicant or holder of the names of the members of the Hearing Board, their occupations, and the businesses or organizations with which they are affiliated, of his privilege of challenge, and of the time and place of the hearing.

(c) Inform the applicant or holder of his privilege to appear before the Hearing Board in person or by counsel or representative of his choice, and to present testimonial and documentary evidence in his behalf, and to cross-examine any witness appearing before the Board; and

(d) Inform the applicant or holder that if within 10 days after receipt of the notice he does not request an opportunity to appear before the Hearing Board, either in person or

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by counsel or representative, the Hearing Board will proceed without further notice to him.

§ 121.17 Challenges. Within five days after receipt of the notice described in § 121.15 the applicant or holder may request disqualification of any member of the Hearing Board on the grounds of personal bias or other cause. The request shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. The affidavit may be supplemented by an oral presentation if desired. If after due consideration the Chairman believes a challenged member is qualified notwithstanding the challenge, he shall notify the person who made the challenge and arrange to proceed with the hearing. If the person who made the challenge takes exception to the ruling of the Chairman, the exception and data relating to the claim of disqualification shall be made a matter of record. If the Chairman finds that there is reasonable ground for disqualification he shall furnish the person who made the challenge with the name of an alternate in lieu of the challenged member and arrange to proceed with the hearing. In the event the Chairman is challenged, he shall forthwith notify the Commandant, furnishing the grounds for the claim of disqualification, and the Commandant shall act upon the challenge in accordance with the foregoing procedure. In addition to the right of challenge for cause, a person who has requested a hearing shall have two peremptory challenges, one challenge for the management member and one challenge for the labor member of the Hearing Board. Should the management member be so challenged, the person who made the challenge may elect to have the management member

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replaced by another management member or by a member not representing either management or labor; if the member peremptorily challenged represents labor, the person who made the challenge may elect to have the labor member replaced by another labor member or by a member not representing either management or labor.

§ 121.19 Hearing procedure. (a) Hearing shall be conducted in an orderly manner and in a serious, business-like atmosphere of dignity and decorum and shall be expedited as much as possible.

(b) The hearing shall be in open or closed session at the option of the applicant or holder.

(c) Testimony before the Hearing Board shall be given under oath or affirmation.

(d) The Chairman of the Hearing Board shall inform the applicant or holder of his right to:

(1) Participate in the hearing;

(2) Be represented by counsel of his choice;

(3) Present witnesses and offer other evidence in his own behalf and in refutation of the reasons set forth in the Notice of the Commandant; and

(4) Cross-examine any witnesses offered in support of such reasons.

(e) Hearings shall be opened by the reading of the Notice of the Commandant and the answer thereto. Any statement and affidavits filed by the applicant or holder may be incorporated in the record by reference.

(f) The Hearing Board may, in its discretion, invite any person to appear at the hearing and testify. However, the Board

shall not be bound by the testimony of such witness by reason of having called him and shall have full right to cross-examine the witness. Every effort should be made to produce material witnesses to testify in support of the reasons set forth in the Notice of the Commandant, in order that such witnesses may be confronted and cross-examined by the applicant or holder.

(g) The applicant or holder may introduce such evidence as may be relevant and pertinent. Rules of evidence shall not be binding on the Hearing Board, but reasonable restrictions may be imposed as to the relevancy, competency and materiality of matters considered. If the applicant or holder is, or may be, handicapped by the non-disclosure to him of confidential sources, or by the failure of witnesses to appear, the Hearing Board shall take the fact into consideration.

(h) The applicant or holder or his counsel or representative shall have the right to control the sequence of witnesses called by him.

(i) The Hearing Board shall give due consideration to documentary evidence developed by investigation, including membership cards, petitions bearing the applicant's or holder's signature, books, treatises or articles written by the applicant or holder and testimony by the applicant or holder before duly constituted authority.

(j) Complete verbatim stenographic transcription shall be made of the hearing by qualified reporters and the transcript shall constitute a permanent part of the record. Upon request, the applicant or holder or his counsel or representative shall be furnished, without cost, a copy of the transcript of the hearing.

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(k) The Board shall reach its conclusion and base its determination on information presented at the hearing, togther with such other information as may have been developed through investigations and inquiries or made available by the applicant or holder.

(l) If the applicant or holder fails, without good cause shown to the satisfaction of the chairman, to appear personally or to be represented before the Hearing Board, the Board shall proceed with consideration of the matter.

(m) The recommendation of the Hearing Board shall be in writing and shall be signed by all members of the Board. The Board shall forward to the Commandant, with its recommendation, a memorandum of reasons in support thereof. Should any member be in disagreement with the majority a dissent should be noted setting forth the reasons therefor. The recommendation of the Board, together with the complete record of the case, shall be sent to the Commandant as expeditiously as possible.

§ 121.21 Action by Commandant. (a) If, upon receipt of the Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mainer's Document, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Board's recommendation, the Commandant is not satisfied that the character and habits of

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life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall:

(1) In the case of an applicant for special validation endorsement, notify him of the Commandant's refusal to enter such endorsement;

(2) In the case of an applicant for a Merchant Mariner's Document, notify him of the Commandant's refusal to issue such document; or

(3) In the case of a holder, revoke and require the surrender of his special validation endorsement.

(c) Such applicant or holder shall be notified of his right, and shall have 20 days from the receipt of such notice within which, to appeal under this part.

§ 121.23 Appeals. (a) The Commandant shall establish at Coast Guard Headquarters, Washington, D.C., an Appeal Board to hear appeals provided for in this part. The Commandant shall designate for the Appeal Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a member from a panel of persons representing management nominated by the Secretary of Labor, and a member from a panel of persons representing labor nominated by the Secretary of Labor. The Commandant shall insure that persons designated as Appeal Board members have suitable security clearance. The Chairman of the Appeal Board shall make all arrangements incident to the business of the Appeal Board.

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(b) If an applicant or holder appeals to the Appeal Board within 20 days after receipt of notice of his right to appeal under this part, his appeal shall be handled under the same procedure as that specified in § 121.15 and the privilege of challenge may be exercised through the same procedure as that specified in § 121.17.

(c) Appeal Board proceedings shall be conducted in the same manner as that specified in § 121.19.

§ 121.25 Action by Commandant after appeal. (a) If, upon receipt of the Appeal Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Appeal Board's recommendation, the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall notify the applicant or holder that his appeal is denied.

§ 121.27 Outstanding endorsements and applications.

(a) All special validation endorsements for emergency service entered upon Merchant Mariner's Documents will be accepted as valid until cancelled, revoked, or suspended by proper authority.

(b) A person who has filed an application for a Merchant Mariner's Document bearing a special validation endorsement for

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emergency service and who has not received such an endorsement prior to May 1, 1956, shall submit a new application in accordance with the requirements of this part.

§ 121.29 Applications previously denied. A person who has been denied a Merchant Mariner's Document bearing a special validation endorsement for emergency service, before May 1, 1956, may file a new application for such an endorsement in accordance with the requirements of this part.

It is hereby found that compliance with the notice of proposed rule making, public rule making procedures thereon, and effective date requirements of the Administrative Procedure Act is contrary to the public interest since this revision of 33 CFR Part 121 is to implement more effectively Executive Order 10173, as amended, and in the public interest should be placed in operation as soon as possible. This amendatory regulation shall become effective May 1, 1956.

50, U.S.C., § 191 (1964)

Regulation of anchorage and movement of vessels during national emergency

Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in

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his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

Within the territory and waters of the Canal Zone the Governor of the Canal Zone, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury.

Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened distrubances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations -

(a) to govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the United States, to inspect such vessels at any time, to place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damange or injury to any harbor or waters of the United States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof;

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(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States. Any appropriation available to any of the Executive Departments shall be available to carry out the provisions of this chapter. June 15, 1917, c. 30, Title II, § 1, 40 Stat. 220; Aug. 9, 1950, c. 656, § 1, 64 Stat. 427; Sept. 26, 1950, c. 1049, § 2(b), 64 Stat. 1038.

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INDEX

	Page
Statement	1
Argument	5
Conclusion	13

CITATIONS

Cases:

American Communications Assn. v. *Douds*, 339 U.S. 382	8, 11
Aptheker v. *Secretary of State*, 378 U.S. 500	9, 10, 11
Blumenthal v. *Federal Communications Comm'n*, 318 F. 2d 276, certiorari denied, 373 U.S. 951	12
Borrow v. *Federal Communications Comm'n*, 285 F. 2d 666, certiorari denied, 364 U.S. 892	12
Cantwell v. *Connecticut*, 310 U.S. 296	10
Dennis v. *United States*, 341 U.S. 494	8
Elfbrandt v. *Russell*, 384 U.S. 11	9, 10, 11
Graham v. *Richmond*, 272 F. 2d 517	7
Homer v. *Richmond*, 292 F. 2d 719	8
In re Anastaplo, 366 U.S. 82	12
Keyishian v. *Board of Regents*, 385 U.S. 589	10, 11
Killian v. *United States*, 368 U.S. 231	8
Konigsberg v. *State Bar*, 366 U.S. 36	12
McBride v. *Roland*, 369 F. 2d 65, certiorari denied *sub nom. McBride* v. *Smith*, No. 1105, Oct. Term, 1966 (May 29, 1967)	7, 8, 13
NAACP v. *Button*, 371 U.S. 415	10
Parker v. *Lester*, 227 F. 2d 708	7
United States v. *Aarons*, 310 F. 2d 341	7
United States v. *Gray*, 207 F. 2d 237	7

Statutes:

Magnuson Act, 64 Stat. 427, 50 U.S.C. 191	1, 2, 5
Subversive Activities Control Act, 50 U.S.C.:	
785	10
794(c)	10
46 U.S.C. 1126	9

268-166—67——1

Executive Orders:
Executive Order 10173, 15 F.R. 7005 5
Executive Order 10450, 18 F.R. 2489 ..... 2, 6
Regulations:
33 Code of Federal Regulations:
6.10–1 ..... 5, 6
6.10–3 5
6.10–9 5
121.01–121.05 5
121.03 6
121.05 4
121.25 6
Miscellaneous:
96 Cong. Rec. 10794–10795 7
S. Rep. No. 2118, 81st Cong., 2d Sess 7
Brown and Fassett, *Security Tests for Maritime Workers: Due Process Under the Part Security Program*, 62 Yale L.J. 1163 (1953) 7
Gilmore and Black, *The Law of Admiralty* (1957) 9
Rule 16(1)(c), Revised Rules, Supreme Court of the United States 1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 196

HERBERT SCHNEIDER, APPELLANT

v.

WILLARD SMITH, COMMANDANT, UNITED STATES COAST GUARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellee moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. 9a) dismissing appellant's complaint for injunctive relief against the enforcement of the Magnuson Act (50 U.S.C. 191) on the ground of its unconstitutionality.

Appellant has a merchant mariner's document, issued to him in September 1956.[1] He was first issued

[1] The Coast Guard issues merchant mariner's documents to those who wish to seek employment on commercial vessels flying the United States flag. Apart from the screening program here

his seaman's papers in 1940, and between 1942 and 1949 he served in various capacities aboard commercial vessels flying the United States flag, including as wiper, oiler, and fireman, and as second, third, and fourth assistant engineer. He possesses the necessary papers or licenses which evidence his technical ability for all of those positions. In later years, appellant has been employed ashore.

On October 20, 1964, appellant applied to the Commandant of the Coast Guard for special validation endorsement of his merchant mariner's document. That endorsement (further described *infra,* pp. 4–6) is required by executive orders and regulations promulgated pursuant to the Magnuson Act, 50 U.S.C. 191, to permit the seaman to sail aboard merchant vessels of the United States of 100 or more gross tons. Together with his application, appellant returned a printed questionnaire (R. 77–82) filled in by him, which called for disclosure of past and present membership in certain designated organizations,[2] including the Communist Party. Since appellant answered affirmatively the question relating to membership in the listed organizations, he was required to provide further particulars on the questionnaire. His response was (R. 82)—

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in question, the documents serve to identify seamen, who are not required to carry passports. In addition, a merchant mariner's document shows the seaman's rating and qualification for certain positions aboard ship, such as engineer, mate, and the like, ratings determined by a seaman's experience and by results of tests administered by the Coast Guard as part of a broad program to insure the safety of merchant vessels and crew.

[2] "Designated" by the Attorney General under Executive Order 10450, 18 F.R. 2489.

I have been a member of many political & social organizations, including several named on this list.

I can not remember the names of most of them & could not be specific about any.

To the best of my knowledge, I have not been a member or participated in the activities of any of these organizations for ten years.

By letter dated March 25, 1965, the Commandant advised appellant that the answers to the questionnaire did not provide sufficient information for him to determine whether appellant's document should be specially validated (R. 70). The Commandant therefore requested appellant to respond under oath to certain interrogatories, set out below,[3] relating generally to the extent and meaningfulness of appellant's membership in any of the designated organizations (R. 70).

[3] The interrogatories (R 84–85) refer to appellant's earlier affirmative answer to the question whether he had been a member of organizations designated by the Attorney General, and to his statement quoted in the text above; he is then asked:

1. With respect to your statements above, furnish the following information, fully and honestly to the best of your ability:

(a) List the names of the political and social organizations to which you belonged, and location.

(b) Furnish approximate dates of membership.

(c) Furnish full particulars concerning the extent of your activities and participation in the organizations. (number and type of meetings/functions attended; positions or offices held; classes or schools attended; contributions made; etc.)

(d) Your reason for discontinuing the membership.

(e) Your present attitude toward the principles and objectives of the organizations.

If your answer is "YES" to the following Questions, *explain fully* in the space provided at the end of the Interrogatories:

Appellant's counsel replied that appellant declined to answer the interrogatories because "it can be none of the Government's business what he reads or what he thinks" (R. 72). He demanded that appellant's document be specially validated forthwith. The Commandment thereupon informed appellant and his counsel that, pursuant to regulation,[4] no further action on appellant's application could be taken unless and until the additional information was supplied.

Thereafter, appellant instituted this suit. In dismissing the complaint, the three-judge district court held that the Magnuson Act and the regulations adopted pursuant to it were constitutional, and that the Commandant's requiring the interrogatories to be

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2. Are you now, or have you ever been, a member of or affiliated with, in any way, the Communist Party, its Subdivisions, Subsidiaries, or Affiliates?

_____
(Answer "Yes" or "No")

3. Have you at any time been a subscriber to the "People's World"?

_____ If your answer is "Yes," give dates.
(Answer "Yes" or "No")

4. Have you at any time engaged in any activities in behalf of the "People's World"?

_____If your answer is "Yes", furnish details.
(Answer "Yes" or "No")

5. What is your present attitude toward the Communist Party?

6. What is your present attitude toward the principles and objectives of Communism?

7. What is your attitude toward the form of Government in the United States?

[4] 33 C.F.R. 121.05(d)(2) provides:

If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

answered as a condition to further administrative action violated neither appellant's First Amendment rights nor procedural due process (J.S. 1a–9a).

ARGUMENT

I. The Magnuson Act, 50 U.S.C. 191 (J.S. 3–4), provides *inter alia, That whenever the President* finds that the security of the United States is endangered by certain events, including "subversive activities," he "is authorized to institute such measures and issue such rules" as necessary; (a) to take full possession and control of vessels and to remove any person not specifically authorized by him to go or remain aboard if in his opinion it is necessary to prevent damage or injury to a vessel, any harbor, or waters of the United States, or to secure observance of rights or obligations of the United States, and (2) to safeguard against destruction, loss or injury from sabotage or other subversive acts, vessels, harbors, ports and waterfront facilities.

Pursuant to this Act, the President issued Executive Order 10173, 15 F.R. 7005, on October 18, 1950. Having found that the security of the United States was endangered by reason of subversive activities, he promulgated certain regulations, one of which authorized the Commandant of the Coast Guard to require every person employed on a merchant vessel of the United States to have a merchant mariner's document bearing a special validation endorsement for emergency service. The Commandant was empowered to prescribe the forms, contents and manner of issuance, to revoke or require surrender of such validated endorsement, and he has implemented his authority through further regulations (see 33 C.F.R. 6.10–1, 6.10–3, 6.10–9, and 121.01–121.05).

Under these regulations, the Commandant must decide whether he is satisfied that "the character and habits of life" of the applicant are such as to warrant the belief that his presence on board vessels of the United States "would not be inimical to the security of the United States" (33 C.F.R. 6.10–1, 121.25). The regulations set out procedures for the handling of applications for special validation endorsement, including the right to a hearing and appeal at three levels. Section 121.03 of the regulations sets out as "standards" certain categories of relevant information which "may preclude" a favorable determination to the applicant. These include acts of the applicant such as (a) advocacy of the overthrow or alteration of the government of the United States by unconstitutional means; (b) commission of or attempts to commit, espionage, sabotage, sedition or treason; (c) performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the government of the United States; (d) deliberate unauthorized disclosure of classified defense information; (e) membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended. These standards do not purport to be all-inclusive, and the Commandant may consider any such information along with other information relevant to the question whether the applicant's presence aboard a vessel would be inimical to the security of the United States.

Every court that has considered the question has held that the Magnuson Act authorizes the screening program outlined above (compare J.S. 19–20), although the early decisions found some procedural deficiencies in the former regulations. See, *e.g.*, *McBride* v. *Roland*, 369 F. 2d 65 (C.A. 2), certiorari denied *sub nom. McBride* v. *Smith*, No. 1105, Oct. Term, 1966, May 29, 1967; *Graham* v. *Richmond*, 272 F. 2d 517, 521 (C.A. D.C.); *Parker* v. *Lester*, 227 F. 2d 708, 715 (C.A. 9);[5] *United States* v. *Gray*, 207 F. 2d 237, 241 (C.A. 9); cf. *United States* v. *Aarons*, 310 F. 2d 341 (C.A. 2). Thus, congressional authorization for the program is not only, in the words of the Second Circuit in *McBride* (369 F. 2d at 69), "quite plain" from the broad language of the Act and its legislative history,[6] but also, it is an issue now well-settled, as the court below held (J.S. 4a–5a).

2. The regulations adopted pursuant to the Magnuson Act do not suffer from unconstitutional vagueness (compare J.S. 14–15). As we have pointed out, the regulations require that the Commandant satisfy himself from "the character and habits of life" of the individual, that the latter's presence on board a vessel would not be "inimical to the security of the

[5] Following the decision in *Parker* v. *Lester*, the regulations were amended to insure that the applicant receive a fair résumé of the information adverse to him and an adequate hearing in which to challenge that information.

[6] See 96 Cong. Rec. 10794–10795 (July 21, 1950) (remarks of Senator Magnuson); S. Rep. No. 2118, 81st Cong., 2d Sess. (1950). See also, Brown and Fassett, *Security Tests for Maritime Workers: Due Process Under the Port Security Program* 62 Yale L.J. 1163, 1188 (1953). Since the Act was passed as an emergency measure during the Korean crisis, its legislative history is limited.

United States." One factor the Commandant may consider is the applicant's "[m]embership in, or affiliation or sympathetic association with" any organization on the so-called "Attorney General's list." The Commandant has construed his regulation, as indeed its language clearly connotes, to require "knowing" rather than "mere" membership, in order to be considered as adversely affecting the individual's application for a document. In that light, the regulations are sufficiently definite to withstand appellant's attack. See *McBride* v. *Roland, supra,* 369 F. 2d at 69.

As the Court of Appeals for the District of Columbia Circuit said in reference to a similar screening program also administered by the Coast Guard (for radio-telegraph operators in the merchant marine), one which uses a similar standard—"character," "habits of life," and "suitable and safe person"—

> Other important public affairs are administered under statutory language no more precise, such as a finding of "public interest, convenience and necessity," or "restraint of trade," or "unfair methods of competition." While these examples do not relate to matters of individual liberty, they are, on the other hand, more indefinite than the criteria of the present statute.

Homer v. *Richmond,* 292 F. 2d 719, 723 (C.A. D.C.).

The regulations may not set forth a "neat, mathematical formulary," *Dennis* v. *United States,* 341 U.S. 494, 515, but they sufficiently and fairly inform both those administering the program and those who seek to challenge any adverse determination. See *American Communications Assn.* v. *Douds,* 339 U.S. 382, 412; *Killian* v. *United States,* 368 U.S. 231, 258.

3. Appellant's principal contention is that the Magnuson Act screening program, and more particularly, the requirement that he answer the interrogatories before his application will receive further consideration, violate his First Amendment rights (J.S. 12–14).

a. From the inception of the Nation, shipping has been a matter of great governmental concern, stemming from the importance of seapower as an agency of commerce and of national defense. Every aspect of shipping, including ship construction, preparation of ships for service, and procurement and qualifications of personnel, is closely regulated. See Gilmore and Black, *The Law of Admiralty,* 778–782 (1957). Quite naturally, the government—which regulates and subsidizes shipping, and provides training facilities for shipping personnel, see 46 U.S.C. 1126—will seek to assure the safety of shipping from subversive activity. Reasonable preventive measures must be taken to that end, among them the denial of clearance to seamen who have held long and meaningful membership in organizations such as the Communist Party.

The Commandant, acting pursuant to the Act, does not seek to regulate speech or association. He is only attempting to insure that merchant vessels and waterfront facilities are safeguarded from easy access by persons who are likely to damage them. And, as the court below noted (J.S. 5a):

> [I]t is hard to imagine a more strategic location for purposes of sabotage of vessels, harbors, ports, and waterfront facilities than in the bowels of deep-draft vessels.

Appellant's reliance (J.S. 13–14) upon cases such as *Elfbrandt* v. *Russell,* 384 U.S. 11, and *Aptheker* v.

Secretary of States, 378 U.S. 500, is misplaced. Those cases involved in effect penal statutes. *Aptheker* concerned Section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. 785, which provided that when a Communist organization is registered, or under final order to register, it shall be unlawful for any member, with knowledge or notice thereof, to apply for or use a passport.[7] The court held Section 6 unconstitutional on its face because it lacked the "knowing," "active," and "specific intent" elements. In so holding, the court pointed to "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application" (378 U.S. at 516).[8] In *Elfbrandt,* the court dealt with an Arizona statute which provided that a public employee required to take an oath to support the federal and State constitutions and the State laws was subject to prosecution for perjury and to discharge from office if he "knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations" or "any other organization" having for "one of its purposes" the overthrow of the State government where the employee had knowledge of the unlawful purpose.[9]

Concededly, this Court's recent opinion in *Keyishian* v. *Board of Regents,* 385 U.S. 589, makes clear, as

[7] The maximum punishment for a violation of Section 6 was $10,000 and five years imprisonment. 50 U.S.C. 794(c).

[8] Quoting from *NAACP* v. *Button,* 371 U.S. 415, 433.

[9] The court noted (384 U.S. at 18, 19) that a penal statute touching rights protected by the First Amendment must be "narrowly drawn to define and punish specific conduct * * *" (quoting from *Cantwell* v. *Connecticut,* 310 U.S. 296, 311).

Elfbrandt and *Aptheker* also indicate, that the presence or absence of a criminal penalty in the statutory scheme, or its application, is not the sole touchstone for decision. But the vice of the statutory scheme held invalid in *Keyishian* was the "impermissible overbreadth" and "vagueness" of its "regulatory maze," through which the individual teacher was forced to transude (385 U.S. at 609, 599, 604).[10] No such objections can be made to the merchant marine screening program. Moreover, the statute involved in *Keyishian* made mere membership in the Communist Party prima facie evidence of disqualification. In contrast, under the Magnuson Act program, the Commandant, as this case illustrates, seeks to find out the extent and meaningfulness of a seaman's membership, and even that is only one factor he may consider in determining whether the seaman's presence on board a United States merchant vessel would be inimical to the security of the Nation.[11]

[10] We note also that *Elfbrandt* and *Keyishian* involved quite direct restrictions upon the dissemination of ideas—upon academic freedom, which this Court in *Keyishian* termed "a special concern of the First Amendment" (385 U.S. at 603). Doubtless, the denial of access to limited areas of employment affecting the national security might have, in some cases, a deterrent effect upon the free expression of ideas, but it cannot be considered that kind of wholesale infringement involved in *Elfbrandt*, *Keyishian*, and to a lesser extent, *Aptheker*, in all of which "less drastic" alternatives were available.

[11] Appellant's analogy to a bill of attainder is therefore inapt (see J.S. 18–19). Membership in an organization on the so-called "Attorney General's list" does not alone render a seaman ineligible for special validation of his document; no punishment for past acts is involved; and clearly the Commandant must decide *in each case* the question whether the *individual's* presence on board a United States merchant vessel would be inimical to the country's security. See *American Communications Assn.* v. *Douds*, 339 U.S. 382, 413–414.

Considering the purpose the Magnuson Act program is designed to serve, the Commandant's interrogatories in this case pursue a relevant and permissible line of inquiry—more clearly than the somewhat similar inquiries upheld in *Konigsberg* v. *State Bar*, 366 U.S. 36, and *In re Anastaplo*, 366 U.S. 82 (membership in the Bar).

b. If (as we believe) the Commandant may seek to determine the extent and meaningfulness of appellant's activity in the organizations to which he admitted being at least a past member, then it follows that the Commandant may hold appellant's application in abeyance until the answers are forthcoming. *Konigsberg, supra*, 366 U.S. at 44; *Borrow* v. *Federal Communications Comm'n*, 285 F. 2d 666 (C.A. D.C.), certiorari denied, 364 U.S. 892; *Blumenthal* v. *Federal Communications Comm'n*, 318 F. 2d 276 (C.A. D.C.), certiorari denied, 373 U.S. 951.

Thus, there is no merit to appellant's complaint (J.S. 15–17) that the prescribed procedure, which he has not yet followed, is inadequate. An application is first considered by the Commandant. Should he deny it, the application is, if requested, considered by a Hearing Board, and the applicant is given the opportunity to offer evidence in a hearing at which he may present witnesses and at which he is afforded the rights to confrontation and counsel. That Board makes an independent recommendation to the Commandant. Should the latter adhere to his decision, the applicant may appeal to an Appeal Board, which may conduct an additional hearing, following which it similarly makes a recommendation to the Com-

mandant. As the Second Circuit held in the *McBride* case, *supra*, 369 F. 2d at 68:

> Procedurally, there is no lack of due process in the statutory scheme, with opportunity to present evidence and cross examine adverse witnesses before the Boards, determination by the Commandant at each stage * * *.

As the court below pointed out, appellant has so far "refused to provide the raw materials" (J.S. 9a) for the Commandant to make the necessary determination. Should appellant do so, and in the event that the Commandant's initial decision is adverse to him, then the procedure outlined will be available to him.[12]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be affirmed.

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JUNE 1967.

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[12] Our position here is similar to that in *United States* v. *Robel*, No. 83, Oct. Term, 1966, set for reargument as No. 8, this Term (see the government's brief in No. 83, pp. 40–48). However, whatever the ultimate constitutional standard may be in *Robel*—*i.e.*, whether the element of "specific intent" must be established—it is clear we think, that appellant cannot fail to furnish relevant information in order for the Commandant to make an informed decision.

U.S. GOVERNMENT PRINTING OFFICE: 1967

In the

Supreme Court of the United States

October Term, 1947

No. 196

HERBERT SCHNEIDER,
Appellant,

v.

WILLARD J. SMITH, Commandant,
UNITED STATES COAST GUARD,
Appellee.

BRIEF OF APPELLANT

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SUBJECT INDEX

	Page
Authorities	iii
Opinion Below	1
Jurisdiction	1
Constitutional Provisions, Statutes, Executive Orders, and Regulations	2
Questions Presented For Review	3
Statement Of The Case	5
Summary Of Argument	9
Argument	15
I. The Jurisdiction of This Court Is Properly Invoked to Review the Decision of the Three-Judge District Court That the Magnuson Act Is Not Unconstitutional, and That the Executive Orders and Regulations Promulgated Under It Are Authorized and Valid.	15
II. The Commandant's Regulations Fail to Afford Due Process of Law.	21
A. The Commandant's Regulations Improperly, and in Violation of Due Process of Law, Shift the Burden of Proof in Screening Procedures from the Government to the Seaman-Applicant.	21
B. The Existing Regulations Fail to Provide Confrontation of Adverse Witnesses and Adequate Notice of the Government's Case Against the Workman.	28
III. The Statute, and the Regulations Issued Under It, Are So Vague As To Be Incapable of Understanding, and Therefore Violate Substantive Due Process.	29

Page

A. The Magnuson Act Is Fatally Vague As to the Conduct To Be Regulated. 29

B. The Regulations Speak in Language Already Ruled By This Court To Be Unconstitutionally Vague. 31

C. Administrative Application of the Regulations Has Not Cured Their Vagueness. 37

D. The Statute and Regulations Require Appellant to Choose Between the Penalty of Perjury Prosecution in Answering Vague Questions and the Penalty of Relinquishing His Right to Seek Private Employment. 38

IV. The Program Threatens Abridgement of Plaintiff's And All Other Seamen's Freedom of Speech And Freedom of Association and Is Therefore Constitutionally Impermissible. 39

V. The Act, If It Authorizes the Regulations, Is a Bill of Attainder or an *Ex Post Facto* Law. 48

A. The Use of the Attorney General's List of Subversive Organizations, If Authorized by the Act, Amounts to an Attainder. 48

B. The Commandant's Regulation Authorizing Use of the Attorney General's List Amounts to *Ex Post Facto* Regulation and Is Therefore Constitutionally Forbidden. 54

VI. First Amendment Freedoms May Be Restricted, If At All, Only Upon a Showing of Urgent Need. 55

A. The Legislative Purpose of Congress Was Narrowly Limited. 56

B. The Inquiries Directed to Plaintiff Relate to Possible Membership in the Communist Party a Decade Ago and Are Irrelevant, There Being No Connection Between Such Past Membership and Present Risk of Sabotage by Plaintiff. 58

Page

VII. The Regulations of Appellee Are Not Authorized. 59

A. Congress Has Not Authorized the Merchant Seamen's Screening Program. 59

B. Congress Did Not Authorize the Procedures Outlined in the Regulations or the Methods Followed by the Coast Guard in This Case... 62

C. If Congress Authorized the Screening Program, There Has Been an Unconstitutional Delegation of Legislative Authority. 63

Conclusion 65

Appendix—Constitutional Provisions, Statutes, Executive Orders, and Regulations .....A-1 to A-21

TABLE OF AUTHORITIES

Cases

Adler v. Board of Education, 342 U.S. 485, 96 L.Ed. 517, 72 S.Ct. 380, 27 A.L.R.2d 472 (1952)..... 19

Aptheker v. Rusk, 378 U.S. 500, 12 L.Ed.2d 992, 84 S.Ct. 1659 (1964).....39, 42

Baggett v. Bullitt, 377 U.S. 360, 12 L.Ed.2d 377, 84 S.Ct. 1316 (1964)....10, 18, 19, 27, 30, 33, 35, 39, 47

Bates v. City of Little Rock, 361 U.S. 516, 4 L.Ed.2d 480, 80 S.Ct. 412 (1960)..... 40

Bouie v. Columbia, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1967 (1964)..... 36

Bridges v. Wixon, 326 U.S. 135, 89 L.Ed. 2103, 65 S.Ct. 1443 (1945)..... 34

Cantwell v. Connecticut, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1940).....39, 43, 65

Cole v. Young, 351 U.S. 536, 100 L.Ed. 1396, 76 S.Ct. 861 .....61, 62

Page

Cramp v. Board of Public Instruction, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961) 18, 27, 35, 39, 40, 41, 47

Cummings v. Missouri, 4 Wall. (71 U.S.) 277, 18 L.Ed. 356 (1867) 49, 50, 53

DeGregory v. Attorney General, 383 U.S. 825, 16 L.Ed.2d 295, 86 S.Ct. 1148 (1966) 27

Dennis v. United States, 341 U.S. 494, 95 L.Ed. 1139, 71 S.Ct. 857 (1951) 33

Dombrowski v. Pfister, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965) 13, 43, 47

Elfbrandt v. Russell, 384 U.S. 11, 16 L.Ed.2d 321, 86 S.Ct. 1238 (1966) 31, 35, 38, 40, 41, 42, 47

Garland, Ex parte, 4 Wall. (71 U.S.) 333, 18 L.Ed. 366 (1867) 49, 53

Garrity v. New Jersey, — U.S. —, 17 L.Ed.2d 562, — S.Ct. — (1967) 28

Greene v. McElroy, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959) 11, 21, 28, 29, 60, 62, 64

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 95 L.Ed. 817, 71 S.Ct. 624 (1951) 49, 51, 53

Kent v. Dulles, 357 U.S. 116, 2 L.Ed.2d 1204, 78 S.Ct. 1113 (1958) 19, 61

Keyes v. Carrick, 268 S.W.2d 397 (Ct. App.Ky. 1954) 32

Keyishian v. Board of Regents, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967) 10, 12, 19, 31, 33, 34, 35, 39, 47

Konigsberg v. State Bar of California, 353 U.S. 252, 1 L.Ed.2d 810, 77 S.Ct. 722 (1957) 40

Lerner v. Casey, 357 U.S. 468, 2 L.Ed.2d 1423, 78 S.Ct. 1311 (1958) 47

Lovell v. Griffin, 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1938) 65

Page

McBride v. Roland, 369 F.2d 65 (1966) 16, 23

NAACP v. Alabama, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958) 39

NAACP v. Button, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963) 12, 17, 41, 45, 60

Noto v. U.S., 367 U.S. 290, 6 L.Ed.2d 836, 81 S.Ct. 1517 (1961) 42

N.Y. Times v. Sullivan, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964) 34

Panama Refining Co. v. Ryan, 293 U.S. 388, 79 L.Ed. 388, 55 S.Ct. 241 (1935) 19, 64

Parker v. Lester, 227 F.2d 708 (1955) 11, 24, 28, 29

Peters v. Hobby, 349 U.S. 331, 99 L.Ed. 1129, 75 S.Ct. 790 (1955) 19, 52, 61

Saia v. N.Y., 334 U.S. 558, 98 L.Ed. 1574, 68 S.Ct. 1148 (1948) 64

Scales v. U.S., 367 U.S. 203, 6 L.Ed.2d 782, 81 S.Ct. 1469 (1961) 42

Schecter, A.L.A. v. U.S., 295 U.S. 495, 79 L.Ed. 1570, 55 S.Ct. 837 (1935) 64

Schenck v. U.S., 249 U.S. 347, 63 L.Ed. 470, 39 S.Ct. 247 (1919) 55

Schneider v. Roland, 263 F.Supp. 496 (1967) 1

Schneiderman v. U.S., 320 U.S. 118, 87 L.Ed. 1796, 62 S.Ct. 98 (1943) 43

Schware v. Board of Bar Examiners, 353 U.S. 232, 1 L.Ed.2d 796, 77 S.Ct. 752 (1957) 43

Slochower v. Board of Education, 350 U.S. 551, 100 L.Ed 642, 76 S.Ct. 637 (1956) 11, 27

Small Co., A.B., v. American Sugar Refining Co., 267 U.S. 233 (1925) 36

Smith v. California, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959) 40

Page

Speiser v. Randall, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958) 11, 24, 25, 35, 43

Spevack v. Klein, — U.S. —, 17 L.Ed.2d 574, — S.Ct. — (1967) 27

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Talley v. California, 362 U.S. 60, 4 L.Ed.2d 558, 80 S.Ct. 536 (1960) 27

Thomas v. Collins, 323 U.S. 516, 89 L.Ed. 430, 65 S.Ct. 315 (1945) 40

U.S. v. Brown, 381 U.S. 437, 14 L.Ed.2d 484, 85 S.Ct. 1707 (1965) 13, 49, 50, 53, 54

U.S. v. Gray, 207 F.2d 237 (1953) 16, 23, 38

U.S. v. Lovett, 328 U.S. 303, 90 L.Ed. 1252, 66 S.Ct. 1073 (1946) 49, 51

U.S. v. Rock Royal Co-operative, 307 U.S. 533, 83 L.Ed. 1446, 59 S.Ct. 993 (1939) 63

Whitehill v. Elkins, — U.S. —, 36 Law Week 4006, CCH U.S. Sup. Ct. Bulletin B 167-175 ..... 12, 19, 31

Wieman v. Updegraff, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215 (1952) 42, 61

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 574, 96 L.Ed. 1153, 72 S.Ct. 863, 26 A.L.R.2d 1378 (1952) 19, 52

Zemel v. Rusk, 381 U.S. 1, 14 L.Ed.2d 179, 85 S.Ct. 1271 (1965) 10, 17, 20, 21

AUTHORITIES

U.S. Constitution

Article I, §1 65

Article I, §9, cl. 3 ..... 2, 48, 51, 53

Article I, §10, cl. 3 51

Amendment I 2, 3, 17, 21, 41, 55, 61

Page

Amendment V 2, 3, 11, 21, 28, 29

Amendment VI 2, 29

U.S. Statutes

8 U.S.C. §1185 (Immigration and Nationality Act of 1952) 18

18 U.S.C. §1001 ..... 7, 38, 46

22 U.S.C. §211(a) (Passport Act of 1926) 18

28 U.S.C. §1253 1

28 U.S.C. §2282 ..... 1, 10

29 U.S.C. §504 (Labor Management Reporting & Disclosure Act of 1959, §504) 53

50 U.S.C. §191 (The Magnuson Act) (40 Stat. 420, 64 Stat. 427, 64 Stat. 1038) 2, 3, 4 5, 8, 9, 10, 12, 14, 15, 16, 18, 19, 29, 30, 38, 47, 48, 50, 54, 55, 56, 57, 60, 62, 63

50 U.S.C. §1928 38

U.S. Executive Orders and Regulations

Executive Order 10173 (3 C.F.R. 356-359) 2, 15, 17, 36, 60

Executive Order 10277 (3 C.F.R. 778-80) 2, 15

Executive Order 10352 (3 C.F.R. 872) 2, 15

Executive Order 10450 32

33 C.F.R. part 6 ..... 2, 15, 22, 65

§6.10-1 22

§6.10-3 5

§6.10-5 22

§6.10-7 22

33 C.F.R. part 121 ..... 2, 15, 22, 35, 65

33 C.F.R. §121.01 47

§121.01(a) 5

Page

§121.03 ..... 32, 48, 56, 57
§121.03(a) 5, 32, 33, 39, 57
(b) 31, 32, 33, 34, 57
(c) 32, 34
(d) 32, 35
(e) 32, 34, 39, 45, 54
§121.05(a) 22
§121.05(c) (1) 23
§121.05(c) (2) 8, 23, 26
§121.05(d) (2) 23
§121.07 22
§121.09(f) 23
§121.11(a) 23
§121.11(b) 23
§121.11(e) 23
§121.19(f) 29
§121.19(g) 29
§121.21(a) 23
§121.21(b) 23
§121.23(c) 24
§121.25(b) 24
33 C.F.R. part 125 ..... 46.

Rules of Court

Former Supreme Court Rule 13, §1 2
Supreme Court Rule 16(6) 15
Supreme Court Rule 36, ¶2 1
Supreme Court Rule 40, ¶1 (c) 1

Page

State Statutes

Maryland

Art. 85A, Md. Anno. Code 1957 ("Ober Act") §13 31

New York

§105, Civil Service Law 12, 19, 33

§3021, Education Law 12, 19, 33

§3022, Education Law 12, 19, 33

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Revised Code of Washington, Ch. 9.18 19

Revised Code of Washington, Ch. §9.18.061 30

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Government Security & Loyalty, 51.1 46

House Report No. 2740, July 25, 1950, 56 Cong., 1st Sess. 56

H.R. Doc. 89-30, "Maritime Manpower Shortage," p. 9 .. 46

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109 U.Pa. L. Rev. 67 (1960)—see Amsterdam

74 Yale L.J. 1 (1964)—see Emerson

IN THE

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No. 196

HERBERT SCHNEIDER,
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v.

WILLARD J. SMITH, Commandant,
UNITED STATES COAST GUARD,
Appellee.

BRIEF OF APPELLANT

OPINION BELOW

The opinion of the district court is reported in 263 Fed. Supp. 496 (1967). It is set forth in the Joint Appendix to the Briefs, beginning at page J.A. 36.[1]

JURISDICTION

This is an appeal under 28 U.S.C. §1253 from the judgment of a three-judge federal district court, convened under the provisions of 28 U.S.C. §2282; on 23

1. In conformance with Rule 36, ¶2, the parties have agreed on the printing of certain portions of the record below, which is printed separately as the "Joint Appendix to the Briefs," which is referred to in this brief as "J.A.," followed by appropriate page number or numbers.

The statutory material required by Rule 40, ¶1(c), to be printed in an appendix is appended to this brief, with separate pagination, and is referred to as "A," followed by appropriate page number or numbers.

January 1967, the three-judge court dismissed the complaint of appellant seeking an injunction against the enforcement of the Magnuson Act, 50 U.S.C. §191, and executive orders and regulations issued thereunder, for repugnance to the constitution.

Notice of appeal from the order of dismissal was filed and served on 17 March 1967. As authorized by former U. S. Supreme Court Rule 13, §1, before the expiration of the 60-day period for docketing this appeal, the Hon. William J. Lindberg, a member of the three-judge district court, granted an order enlarging the time for docketing this appeal to and including 26 May 1967. Appellant filed and served a jurisdictional statement, and this appeal was docketed on 26 May 1967.

CONSTITUTIONAL PROVISIONS, STATUTES, EXECUTIVE ORDERS, AND REGULATIONS

The constitutional provisions here involved are Article I, §9, Clause 3, and Amendments 1, 5, and 6.

The statute involved is the Magnuson Act, 50 U.S.C. §191, 40 Stat. 220, 64 Stat. 427, 64 Stat. 1038.

The Executive Orders are E.O. 10173, E.O. 10277, and E.O. 10352, (3 C.F.R. 356-359; 3 C.F.R. 778-780; 3 C.F.R. 872; 15 F.R. 7005, 16 F.R. 7537, 17 F.R. 4607).

The regulations appear in 33 C.F.R. part 6, and 33 C.F.R. part 121.

All of these provisions are set out in the appendix to this brief, pp. A-1 to A-21.

QUESTIONS PRESENTED FOR REVIEW

1

Is the Magnuson Act unconstitutionally vague, on its face, and as applied, because it includes in its prohibitory sweep, through use of imprecise, undefined terms such as "subversive activities" and "subversive acts . . . or other similar causes," not only deliberate criminal acts properly subject to regulation, but also constitutionally protected exercise of political association, belief, and speech without adequate warning as to what uses of such First Amendment rights are in fact forbidden?

2

Does the Magnuson Act as applied through the Coast Guard regulations deny due process of law to seamen by requiring them to bear the burden of proving to the Coast Guard's satisfaction that their exercise of First Amendment rights of speech, association and activities on behalf of the press is free from unlawful taint?

3

Do the Coast Guard regulations under the Magnuson Act deny due process of law by failing to provide a hearing procedure that permits confrontation and cross-examination of adverse witnesses, and if so, must appellant submit himself to this procedure in order to object to its unconstitutionality?

4

May the Coast Guard deny appellant the right to seek employment as a marine engineer by insisting that before his application for specially validated shipping papers is processed he waive rights protected under the First and Fifth Amendments and answer broad, vague inquiries

about his political beliefs, associations, and activities on behalf of the press?

5

Do the Magnuson Act and the screening program administered under it have a constitutionally prohibited "chilling effect" upon the exercise of First Amendment rights?

6

If the Magnuson Act authorizes the use of the Attorney General's list of subversive organizations as one of the criteria for determining the acceptability of seamen for maritime employment, is the act as so applied a bill of attainder or *ex post facto* law?

7

If the Magnuson Act authorizes the screening program administered under it, does it deny due process of law to seamen by creating a factually unsupported assumption that the political associations and beliefs of an individual permit an accurate assessment of the likelihood that he will engage in acts of sabotage?

8

Does the Act unconstitutionally delegate to the executive branch of government the legislative power to create the screening program administered by the Coast Guard?

9

Can an intent on the part of Congress to authorize the screening program administered by the Coast Guard be found either in the statutory language of the Act itself or in the Congressional history of the Act?

STATEMENT OF THE CASE

Appellant is a qualified and licensed marine engineer who sailed on United States merchant vessels as a merchant seaman in various capacities between 1942 and 1949 (J.A. 10). Since 1949 he has engaged in non-maritime employment (J.A. 10). In October 1964 he secured the renewal of his license as a second assistant marine engineer, originally issued to him in 1945, and he applied to the United States Coast Guard office in Seattle, Washington for renewal and validation of his merchant mariner's documents first issued to him in 1940 (J.A. 10). Regulations of the United States Coast Guard issued under the claimed authority of the Magnuson Act, 50 U.S.C. §191, provide that "All licensed officers and certificated men who are employed on merchant vessels of the United States" of over 100 gross tons "must be holders of special validated documents prescribed by the Commandant." (33 C.F.R. §610-3, p. A-8, and 33 C.F.R. §121.01(a), p. A-11.)

Appellant applied to the Coast Guard for the required special validation of his existing merchant mariner documents.

As a part of this application for this special validation, appellant was required to answer under oath the question "Are you now, or have you ever been, a member of, or affiliated or associated with in any way any of the . . ." approximately 280 organizations named by the Attorney General as "subversive," which organizations were listed in the application (J.A. 27-33). He answered "Yes," (J.A. 27), and added an explanation:

"I have been a member of many political & social

organizations, including several named on this list. I cannot remember the names of most of them & could not be specific about any. To the best of my knowledge I have not been a member or participated in the activities of any of these organizations for ten years." (J.A. 33)

His application was dated and submitted to the Coast Guard on 19 October 1964. On 13 March 1965, he demanded, through his attorney, an explanation for the delay in processing his application and at the same time protested the use of the Attorney General's list as an "unreasonable criteria as a precondition of employment," violative of "constitutional standards" (J.A. 18). A reply from the Coast Guard excused the delay on the ground of appellant's "reluctance to furnish names and dates of his membership in several of the organizations which have been designated by the Attorney General . . . ," but "anticipated that action will be taken in the near future" (J.A. 19). After appellant's counsel had again protested the delay and the use of the Attorney General's list (J.A. 20), the Coast Guard sent him a set of written interrogatories (J.A. 34-36), to be answered under oath, supplemental to the previous application and referring to appellant's statement on that application that he had "been a member of of many . . . organizations, including several named on" the Attorney General's list. The interrogatories asked appellant to:

"(a) List the names of the political and social organizations to which you have belonged, and location.

"(b) Furnish approximate dates of membership.

"(c) Furnish full particulars concerning the extent of your activities and participation in the organiza-

tion (number and type of meetings; functions attended; positions or offices held; classes or schools attended; contributions made; etc.).

"(d) Your reason for discontinuing the membership.

"(e) Your present attitude toward the principles and objectives of the organizations."

The interrogatories also requested answers and a full explanation concerning the following:

"Are you now, or have you ever been, a member of or affiliated with, in any way, the Communist Party, its Subdivisions, Subsidiaries, or Affiliates?

"Have you at any time been a subscriber to the 'People's World'? If your answer is 'Yes,' give dates.

"Have you at any time engaged in any activities in behalf of the 'People's World'? If your answer is 'Yes,' furnish details.

"What is your present attitude toward the Communist Party?

"What is your present attitude toward the principles and objectives of Communism?

"What is your attitude toward the form of Government in the United States?"

The interrogatories were accompanied by a form of oath which includes a warning that "ANY FALSE STATEMENT MAY BE PUNISHABLE UNDER §1001, TITLE 18, UNITED STATES CODE" (J.A. 36). (18 U.S.C. §1001 creates a felony, punishable by up to five years' imprisonment and $10,000 fine.)

The Coast Guard notified appellant by letter dated 23 March 1963:

"No further action will be taken on your application until your reply is received at this Headquarters." (J.A. 34)

Appellant refused to answer these supplemental interrogatories, stating through his attorney that it was because of his "commitment to the Constitution . . . and the Bill of Rights, that he finds the questions so obnoxious" (J.A. 22) and that it was not he "who is subversive . . . but rather . . . those who would insist that a matter of what a person reads or thinks is relevant to their dedication to the freedom principles for which this country stands" (J.A. 23). Appellant declined to risk possible perjury prosecution in answering (J.A. 22-23), the vague questions put to him (pp. 6-7 above) and disclosed through his attorney what "the most superficial investigation would have confirmed" (J.A. 23): i.e., that he had belonged to the Communist Party U.S.A. and other organizations on the Attorney General's list during the decade 1940 to 1950, and had left those groups because of disagreement with their techniques and methods.

No further action was taken by the Coast Guard on appellant's application. Appellee seeks to justify this refusal to process the application by 33 C.F.R. §121.05(c)(2), (p. A-14, below) requiring the Commandant to hold an application "in abeyance" if the applicant fails to answer any question put to him.

After further fruitless correspondence, appellant filed his complaint (docket entry for 23 September 1965, J.A. 1), praying for a declaratory judgment that the Magnuson Act and the Executive Orders and regulations issued under it are unconstitutional, seeking an injunction requiring the Coast Guard to approve his application for a special validation, and enjoining the Coast Guard from

interfering with plaintiff's employment on U.S. flag vessels.[2]

A three-judge court was designated to hear the case on 30 September 1965 (J.A. 1).

The appellee stipulated in the pre-trial order filed on 30 September 1966, that he did not intend to contest at the trial by evidence to the contrary the fact that plaintiff was then and always had been loyal to the United States of America, that he had not been active in any organization on the Attorney General's list in the past 10 years, and had never committed any act of sabotage or espionage or any act inimical to the security of the United States of America, but appellee was "unable to concede" these facts and took the position that they were immaterial (J.A. 14).

The case was tried to the three-judge court on stipulated facts including the exhibits to the pre-trial order and was briefed and argued without further evidence. The issues of law below were essentially those presented here.

SUMMARY OF ARGUMENT

I.

The jurisdiction of this court is properly invoked.

Appellant's complaint below directly challenged the constitutionality of the Magnuson Act on the ground that a statute is fatally vague and overbroad in an area touching First Amendment freedoms (where precision of regulation is constitutionally required) when it purports to

2. In the original complaint, plaintiff prayed for damages, but the pre-trial order provided that "pursuant to stipulation of the parties the damage question is reserved until after the determination of the constitutional questions of law" (J.A. 16).

authorize an administrative regulatory system solely on the basis of an executive finding of a threat to the security of the United States from "subversive activity," and when it further purports to grant the executive unlimited authority to deny seamen the right to follow their calling, in order to safeguard vessels and waterfront facilities from "subversive acts". This is a substantial constitutional challenge under the "doctrine which has emerged" with such cases as *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), and *Baggett v. Bullitt,* 377 U.S. 360 (1964).

Where a substantial constitutional challenge to a statute itself is presented and injunctive relief is sought against its enforcement through the regulations it purports to authorize, a three-judge court must be, and in this case was properly, convened, as required by 28 U.S.C. §2282. Whether or not such a challenge is upheld on appeal, the substantiality of that challenge confers appellate jurisdiction upon this court, which may then pass on all issues of law presented below, including constitutional challenges to the regulations and issues of statutory interpretation, such as those discussed in the following points. *Zemel v. Rusk,* 381 U.S. 1 (1965).

II.

A. The rules and regulations that apply the Magnuson Act create a screening program designed to prevent "subversives" from becoming seamen. The Coast Guard, after determining that a prospective seaman has the necessary skills of his calling, places a further qualification upon his right to pursue his calling: that he obtain from the Coast Guard a special validation of his qualifying papers. Such validation is issued only to those who satisfy the Commandant that their character and habits of life are such

that their presence on board merchant vessels will not be "inimical to the security of the United States". The inquiries directed to seamen under the regulations relate in major part to the exercise of First Amendment rights, asking about past or present membership in any group designated by the Attorney General as subversive.

The burden of satisfying the Commandant that the seaman does not have a "bad First Amendment character" is thrust upon the applicant, who must answer under penalty of perjury all of the Commandant's inquiries to him designed to expose his "subversive" associations, speech, or activities. But to cast upon an individual the onus of satisfying an administrative official that he is not subversive, i.e., that he has not exercised his rights of speech, association, or publication in a manner regarded as impermissible by that administrator, is an unconstitutional shifting of the burden of proof, violative of the Fifth Amendment's requirement of due process of law. *Speiser v. Randall*, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958), and the Fifth Amendment's bar against self-incrimination, *Slochower v. Board of Education*, 350 U.S. 551 (1956).

B. The regulations further deny due process in failing to provide a hearing procedure that permits confrontation and cross-examination of all adverse witnesses during the screening process. This constitutional defect, condemned broadly in *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959), and specifically held to be fatal in *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955), has never been remedied by the Coast Guard. The regulations still contemplate the use of "faceless informers".

Although appellant Schneider never reached the "hearing stage" because of his refusal to answer inquiries that he believed to invade his constitutional rights, he could not be required to subject himself to a procedure so lacking in that fundamental fairness demanded by due process.

III.

The statute and regulations are unconstitutionally vague and overbroad in an area where "precision of regulation is the touchstone of constitutionality". *NAACP v. Button*, 371 U.S. 415 (1963). The vice of the statute itself in purporting to authorize regulations to prevent "subversive activity" and "subversive acts" in connection with maritime occupations is compounded by the rules and regulations which define these already vague phrases in terms of "seditious acts" and utterances, "support of foreign governments", and "advocacy of alteration of the government of the United States by unconstitutional means." Appellant is required, under penalty of perjury, to describe his past conduct in the very phrases that this Court found constitutionally unacceptable in the regulatory scheme set up in New York's Feinberg law, *Keyishian v. Board of Regents, supra*, p. 10, and in the various disclaimer oaths required of teachers and others in the line of cases leading up to *Whitehill v. Elkins*, No. 27, October Term, 1967, 36 Law Week 4006.

Appellant, had he wished to avoid conduct that would result in his being screened out of his lawful employment, could not have determined from the statute or the regulations what controversial activities in the area of speech or association he ought to have avoided to assure his continued eligibility for employment nor could he safely

describe those activities under oath in the terms required by the inquiries put to him.

IV.

Because the regulations thrust so broadly into areas of First Amendment freedoms, the only safe course for the 140,000 or more maritime workers presently affected by the screening program is to steer far wider of the potentially dangerous zone of controversial opinion, speech, or association. Moreover, if this program is applicable to one area of private employment thought to affect national security, it is potentially applicable to millions of additional workers not now covered by federally administered screening programs. This potentiality extends the "chilling effect" of maritime screening to virtually all private employment, and then to society as a whole. But "free expression [is] of transcendent value to all society." *Dombrowski v. Pfister*, 380 U.S. 479, 486, 14 L.Ed. 2d 22, 85 S.Ct. 1116 (1965). This threat to the freedom of all far outweighs any benefit which may be speculatively derived from barring persons with present or past radical sympathies from access to maritime facilities.

V.

The Commandant uses the Attorney General's list of subversive organizations as a touchstone to determine qualifications for special validations; membership in one or more of the listed organizations is treated as a sufficient ground to deny the constitutionally protected right to private employment. Where Congress by law bars private employment on the basis of membership in an organization, such a statute is a bill of attainder. *United States v. Brown*, 381 U.S. 437 (1965). Congress

may not authorize the Commandant to do what it is forbidden to do.

If the Magnuson Act authorizes the Commandant's use of the Attorney General's list to define the class of seamen having objectionable characteristics, the Magnuson Act operates as a bill of attainder.

VI.

Legislation thus trenching on First Amendment freedoms carries with it no presumption of constitutionality, but requires a demonstration of urgency and relevancy. An overriding necessity for protection from a clear and present danger must appear. But neither an urgent need for such a program in terms of evidence of any threat from acts of sabotage, nor any correlation between radical sympathies or associations and proclivity for acts of sabotage or threat of physical injury or damage was shown either in the Congressional history leading to the passage of the act, the promulgation of the executive orders, or the history of maritime employment in the United States. Absent such demonstrable need or relevancy, the statute and regulations fail the test required for constitutionality.

VII.

Neither the text of the Magnuson Act nor its congressional history gives any indication that Congress contemplated such a sweeping political inquiry as has been launched by the Commandant under the purported authority of the Act. If possible, congressional acts should be construed in such a way as to sustain their constitutionality. The Commandant's screening program raises serious constitutional problems. The Act should therefore be interpreted as granting no authority to the Comman-

dant to intrude into areas of political belief, advocacy, and association. If the Act authorizes the screening program, it unconstitutionally delegates legislative power to the executive.

ARGUMENT

I. The Jurisdiction of This Court Is Properly Invoked to Review the Decision of the Three-Judge District Court That the Magnuson Act Is Not Unconstitutional, and That the Executive Orders and Regulations Promulgated Under It Are Authorized and Valid.

In postponing further consideration of the question of jurisdiction in this case to the hearing on the merits, the court notified counsel that they should address themselves at the outset of their briefs and oral argument to the question of jurisdiction. Rule 16(6); cf. *Sweezy v. New Hampshire*, 354 U.S. 234, 1 L.Ed.2d 1311, 77 S.Ct. 1203 (1957).

In the complaint filed below (J.A. 2-6) appellant asked the court to declare unconstitutional, null, and void, 50 U.S.C. §191 and Executive Orders 10173, 10277, and 10352 issued under it, and regulations applying the act and executive orders, 33 C.F.R. parts 6 and 121, and to enjoin appellee from interfering with appellant's employment upon United States flag vessels in the application of the Act and executive orders and regulations issued thereunder. To hear this challenge a three-judge court was convened (J.A. 1).

The pre-trial order entered by the court noted as issues of law to be determined, a two-pronged attack, statutory and constitutional, that is, (1) whether the Magnuson Act authorized the kind of screening program which the Coast

Guard applied to bar appellant from private employment aboard merchant vessels and (2) whether, if so, the statute, executive orders, and regulations were unconstitutional (J.A. 14-15).

Counsel briefed and argued both points below.

Appellant continues his two-pronged attack in this court, challenging the constitutionality of a statute which purports to delegate unlimited authority to the executive to launch so broad an inquiry into ideas, speech, association, and the press as a precondition to private employment of seamen, see below, pages 29 to 39, and at the same time questioning whether the statute must necessarily, or indeed can properly, be construed to authorize such a broad invasion of constitutionally protected freedoms. See below, pages 59 to 65.

On the authority of *Parker v. Lester,* 227 F.2d 708 (9th Cir. 1955); *United States v. Gray,* 207 F.2d 237 (9th Cir. 1953); and *McBride v. Roland,* 369 F.2d 65 (2nd Cir. 1966), the court below rejected appellant's contention that the Magnuson Act does not authorize the screening program (J.A. 39-40), and then went on to rule that the regulations so authorized were in all respects constitutional (J.A. 42-43).

The Magnuson Act provides, *inter alia,* that whenever the President finds that the security of the United States is endangered by "subversive activity," p. A-1, he "is authorized to institute such measures and issue such rules and regulations" as are necessary to safeguard vessels, harbors, and ports and waterfront facilities "from sabotage or other subversive acts, accidents, or other causes of similar nature" (p. A-2).

The executive order upon which the present regulations are based, E.O. 10173, issued by President Truman on 18 October 1950, explicitly finds that "the security of the United States is endangered by reason of subversive activity," (p. A-2). No other finding is made. Thus, the act as applied through the executive order and the regulations is broadly directed against "subversive activity". A substantial constitutional question is presented by a statute that thrusts so broadly into an area where "precision of regulation is the touchstone of constitutionality". *NAACP v. Button*, 371 U.S. 415, 432-33, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963).

In *Zemel v. Rusk*, 381 U.S. 1, 14 L.Ed.2d 179, 85 S.Ct. 1271 (1965), the question of jurisdiction was also postponed to the hearing on the merits on a record strikingly similar to this one. Thus, in *Zemel* there was a similar constitutional attack upon a regulatory scheme and a parallel constitutional attack upon the underlying statute that purportedly authorized the regulations. The complaint initially brought before the three-judge court alleged that the statute was invalid as an unconstitutional delegation of legislative power to the executive. Independently, the regulations purportedly authorized by the statute were attacked as violative of freedoms protected by the First Amendment. Finally it was alleged in *Zemel*, as here, that the statute failed to authorize the regulations.

The court's opinion dealt at the outset with the jurisdictional question posed by this dual constitutional challenge. It was urged by the Solicitor General that the attack was in reality upon an administrative, as opposed to a legislative, policy and that therefore a three-judge court need not have been convened. 381 U.S. at 6.

But the court then noted that the allegation that the acts[2a] "contain no standards and are therefore an invalid delegation of legislative power" was a constitutional challenge assailing the statutes themselves.

Although this constitutional argument directed at the statute itself was ultimately not accepted by a majority of the court, it was found to be substantial and to support the holding that the three-judge court was properly convened, and that this court therefore had jurisdiction of the appeal.

Having thus acquired jurisdiction, the court was free to deal with all of the challenges—to the statute itself, to the statute as applied by the regulations, and to the regulations standing alone.

Likewise appellant here in his complaint below directly attacked the Magnuson Act itself as unconstitutionally vague, J.A. 4, and argued this point in his trial brief (R. 134).[3]

The attack was directed toward the only substantial and legislatively operative words in the act itself that became applicable to appellant, the vague and ominous words

2a. The Passport Act of 1926, 44 Stat. 887, 22 U.S.C. §211(a) (1958 ed.); Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. §1185 (1958 ed.).

3. The attack on the statute itself for its vagueness appears in appellant's trial memorandum in the following language:

> "A statute that contains no definite standards, but depends upon shifting interpretations, moods, and attitudes, is antagonistic to the axiomatic theme of our jurisprudence that law must be unvarying in its application. The vice of unconstitutional vagueness is further aggravated where, as here, the statute and regulations touch upon the exercise of those freedoms protected by the First Amendment. See *Baggett v. Bullitt* [citation omitted], *Cramp v. Board of Public Instruction* [citation omitted], and see note 109 U.Pa.L.Rev. 67, 77-85 ["The void-for-vagueness doctrine in the Supreme Court," by Anthony G. Amsterdam].

"subversive activities" and "subversive acts". The constitutional infirmity of vagueness in the statutory use of precisely these words in a state act, R.C.W. 9.81.010 ff. (Washington) had already been considered by this court in *Baggett v. Bullitt*, 377 U.S. 360, 362-63; *cf. Whitehill v. Elkins*, No. 27, October 1967 Term, decided 6 November 1967, 36 Law Week 4006.

1. In light of the "constitutional doctrine which has emerged" since *Adler v. Board of Education*, 342 U.S. 485, appellant's challenge to the statute on its face cannot be regarded as insubstantial or frivolous, and clearly required the convening of the three-judge court below. *Keyishian v. Board of Regents of N.Y.*, 385 U.S. 589, 17 L.Ed. 629, 87 S.Ct. 675 (1967).[4]

The Magnuson Act belongs to that large category of statutes which become applicable to a particular person

4. Appellant also raised below, as an additional direct constitutional challenge to the Magnuson Act, the precise point which *Zemel* held to be the substantial constitutional challenge that there supported appellate jurisdiction. On page 11 of the trial brief (R. 97, ll. 15-24) appellant argued:

> "Even if Congress' intent to authorize a personnel screening program were much more clear than it is here, there is reason to doubt that Congress could authorize creating of such a screening program by language as general as that of the Magnuson Act". See *Peters v. Hobby*, 349 U.S. 331, 350 (1955) (Black, J. concurring); [The concurring opinion at the page cited reads as follows: "I also doubt that Congress could delegate power to do what the President has attempted to do in the Executive Order under consideration here. And of course the Constitution does not confer law-making power on the President."] *Kent v. Dulles*, 357 U.S. 116, 129 (1958). [The Court's opinion at the page cited reads as follows: "If that 'liberty' is to be regulated it must be pursuant to the law-making functions of the Congress, *Youngstown Sheet & Tube Co. v. Sawyer*, [citation omitted]. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See *Panama Refining Co. v. Ryan*, [citation omitted]. . . . We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of citizens." 357 U.S. 116, 129.]

or class only upon implementation by "measures" or "rules and regulations" effected by the executive. The contours of the underlying legislation cannot be fully understood until the issuance of the administrative rules and regulations.

The unconstitutional potentiality of the statute itself can be challenged only when protected rights of an individual are infringed by the executive and administrative action. If the challenged infringements upon individual rights and freedoms are authorized by the underlying statute, as the court below held they were in this case, a single federal judge is without jurisdiction to afford the injured litigant the full relief to which he is entitled, and his injury is further compounded by delay in the ultimate vindication of his claim and redress of his grievance. It cannot be assumed that Congress intended to restrict the convening of a three-judge court to those situations in which the statutes attacked were self-sufficient and able to be enforced without the aid of interpreting administrative rules and regulations.

We read *Zemel* as holding that once a genuine and substantial challenge to the statute is ascertained from the issues framed before the three-judge court, *jurisdiction* on appeal to this court is established. Whether or not the particular substantial constitutional challenge so ascertained is ultimately sustained after hearing on the merits, this court may properly consider every issue raised before the three-judge court. In this case these also include questions arising from the regulations alone: Whether these implementing regulations deprive appellant of due process of law and require him to surrender constitu-

tionally protected rights and freedoms as a condition to his pursuit of his calling; whether they unconstitutionally restrict freedoms guaranteed by the First Amendment; and whether they constitute a bill of attainder and an ex post facto law. They include the non-constitutional questions of whether the statute does in fact authorize the regulatory screening program at all, and whether it authorizes the specific procedures applied to prevent consideration of his application for validated documents. We submit that it is the rule of *Zemel* that all of these matters are properly before this court.

II. The Commandant's Regulations Fail to Afford Due Process of Law.

A. *The Commandant's Regulations Improperly, and in Violation of Due Process of Law, Shift the Burden of Proof in Screening Procedures from the Government to the Seaman-Applicant.*

The right to hold specific private employment and to follow a chosen profession free from unnecessary governmental interference comes within the liberty and property concepts protected by the Fifth Amendment. *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959). The employment in which appellant seeks to engage is private employment. It can be regulated only under the limitations of fundamental concepts of due process of law.

This screening program in no way involves the right of private employers in the maritime industry to create and maintain their own standards for employment. The screening program of the Coast Guard applies prior to the time that the would-be mariner seeks to obtain private employment as a pre-condition to his entry into this field of

employment at all. In this respect, the Coast Guard's screening program is unique among the governmental security programs now in effect.[5]

The regulations applicable to appellant and other seamen explicitly and repeatedly put on the seaman the burden of establishing a negative fact: that his presence aboard vessels would *not* be inimical to the security of the United States.

A detailed examination of 33 C.F.R. part 6 and part 121, demonstrates clearly that in the Coast Guard screening program, the applicant bears this burden of persuasion. No person may be issued a document required for any employment on a merchant vessel "unless the Commandant is satisfied that the character and habits of life of [the workman] are such as to authorize the belief that [his] presence . . . on board would not be inimical to the security of the United States." 33 C.F.R. §6.10-1, p. A-7 below.

This is the same standard of proof that is required for "special validation for emergency service" of a seaman's previously issued Merchant Mariner documents, the endorsement here sought by appellant. 33 C.F.R. §121.07, p. A-14 below.[6]

The process of securing the validation must be begun by the mariner. 33 C.F.R. §121.05(a), p. A-13 below. The regulations require that the applicant furnish all informa-

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5. The other security programs administered by Federal agencies apply to Federal employment, or private employment with a specific contractor with the United States.

6. The same standard of proof is required to be met by the applicant for the Coast Guard Port Security Card created by 33 C.F.R. §6.10-5 and 6.10-7, p. A-8 below.

tion demanded of him by the Coast Guard, §121.05(c)(1), pp. A-13 to A-14 below.

Where, in the opinion of the Coast Guard, the applicant "fails or refuses to furnish the required information or fails or refuses to make full and complete answer with respect to all matters of inquiry", the Coast Guard does as it did here—it stops all work on the application, §121.05(c)(2), p. A-14 below, §121.05(d)(2), p. A-14 below.

It appears from the Regulations, then, that the mariner must assume the initial burden. If his showing is insufficient[7] the Coast Guard issues a notice to that effect giving reasons for the Commandant's not being satisfied as to applicant's character, etc. (§121.09(f), p. A-15 below, §121.11(a), p. A-15 below). The mariner may file a response to the notice, §121.11(b), p. A-15 below. If the response is unsatisfactory, the case goes to a Hearing Board, §121.11(e), p. A-16 below.

The regulations do not state whether the applicant or the Coast Guard opens the evidence before the Hearing Board, and practice varies. *Cf. U.S. v. Gray*, 207 F.2d 237 (9th Cir. 1953) at 240-1, and *McBride v. Roland*, 369 F.2d 65 (2nd Cir. 1966). But the applicant continues to carry the burden of persuading the Commandant that the workman's presence "would not be inimical to the security of the United States", §121.21(a), p. A-19 below.

If as a result of this hearing and the recommendation of the Board, the Commandant is still not satisfied, he notifies the mariner again (§121.21(b), p. A-19 below)

7. The pre-trial order in this case makes clear that the Coast Guard had no independent evidence, at least up to 30 September 1966, that appellant was a person whose "presence would be inimical and rejects this as immaterial to the issues in the case (J.A. 14).

and the mariner may appeal to an Appeal Board (§121.23 (c), p. A-19 below). Once again the Commandant must be satisfied as to the mariner's habits, etc., §121.25(b), p. A-20 below.

At all stages, from the initial application for validation in which the prospective mariner must supply information about his exercise of First Amendment rights in the area of association to the final stage of administrative determination, the seaman must justify to the Coast Guard his exercise of First Amendment rights. He must prove that he does not have a bad First Amendment character.

This defect was inherent in the screening program from its outset and was noted in *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955), a proceeding in which some six hundred seamen applicants were granted their special validations by court order because of glaring violations of due process of law in the then-existing program. The Court of Appeals said at 712: "In short, the burden was placed on the seaman." Despite some changes in the program as a result of that litigation, no effort was made by the Commandant to remove the burden of proof from the applicants and shift it to the government.

Speiser v. Randall, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958), establishes that to place such a burden on the exercise of First Amendment rights is violative of due process of law. Speiser was required first to show that he was a veteran to qualify for tax exemption. As a second qualifying standard he was required to show by a disclaiming oath that his exercise of First Amendment rights was of a non-criminal character. It was assumed in *Speiser* that California had a legitimate interest

in refusing a tax exemption to a person engaged in proscribed speech for which he might be criminally prosecuted, but the method chosen to suppress "criminal speech" denied due process by shifting the burden of proof.

Here, Schneider has been required to show, and has shown, that he possesses the skills required to pursue his employment as a seaman. As in *Speiser* it may be assumed here that the Federal government has an interest in preventing persons who will commit sabotage from shipping on United States flag vessels. *Speiser* holds that the applicant who has made a *prima facie* showing that he falls within the class entitled to exercise a right may not be required to carry the burden of showing that he is not within the criminal class. Schneider, however, is required by the Commandant to show that he does not fall within the group of persons whose "presence on board would be inimical to the security of the United States," where "inimical" clearly refers to exercise of First Amendment rights.[7a] But *Speiser* teaches that it is the government that has the burden of establishing that the appellant falls within the class of people who can be barred from exercising these constitutionally probated rights, for "Due process commands that no man shall lose his liberty unless the government has borne the burden of producing the evidence and convincing the fact-finder of his guilt." 357 U.S. at 526. The government "must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which are essential to the workings of a free society." 357 U.S. 513 at 521.

7a. See below, p. 32-36.

The improper shift of the burden of proof began in Schneider's case, as it did in Speiser's, at the very outset, when the government insisted upon answers to interrogatories probing deeply into protected areas of belief, association, and speech, and carrying the unmistakable implication that Schneider had to prove himself to the Coast Guard. In explaining its second set of inquiries, the Coast Guard said that Schneider's original application "does not contain in the judgment of the Commandant, sufficient information for a determination with respect to your eligibility" (J.A. 34). Schneider was required to explain away his membership in organizations, his supposed reading of the "People's World", and to give a satisfactory account of his views on "Communism" and "the form of Government in the United States".

His failure to give such explanation was regarded by the Commandant as a wholly sufficient reason to stop all work on his papers (J.A. 34), relying on 33 C.F.R. §121.05 (c)(2), (p. A-14 below). The Commandant asserts, with a show of ingenuousness, that §121.05(c)(2) does no more than put teeth into a requirement that the seaman "cooperate" with the Coast Guard in the process of special validation. In fact, however, the Coast Guard is requiring Schneider as a pre-condition of the Coast Guard's even *considering* the possibility of letting Schneider work, to waive vital First Amendment rights by divulging (under penalty of perjury) his past, lawful political activities, his past and present political beliefs – which no man can be required to divulge to government as a conditon of private employment – his activities, if any, on behalf of a lawful newspaper, and his present estimates of the goals of various suspected groups.

Appellant is protected by "the guarantee of the First Amendment that a person can speak or not, as he chooses, free of all governmental compulsion," *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 830, 16 L.Ed.2d 295, 86 S.Ct. 1148 (1966). As in *DeGregory*, no showing is made of untruthfulness in appellant's answers to prior inquiries; the information sought about appellant's acts is "historical, not current." See also, as to the right to anonymity in exercise of First Amendment rights, *Talley v. California*, 362 U.S. 60, 4 L.Ed.2d 558, 80 S.Ct. 536 (1960).

Further, insofar as the inquiries relate to past conduct that might be regarded as unlawful advocacy or association, the Coast Guard patently seeks to condition the exercise of the right to employment upon waiver of the right not to accuse one's self. This the government may not do. *Slochower v. Board of Education*, 350 U.S. 551, 100 L.Ed. 642, 76 S.Ct. 637 (1956). In employee screening programs, government may not *require* disclosure of such associations under penalty of perjury, even though the risk of prosecution *seems* slight, for "experience teaches us that prosecutors too are human," *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961).

As the Court said in *Baggett v. Bullitt*, 377 U.S. 360, 373, 12 L.Ed.2d 377, 84 S.Ct. 1316 (1964):

> "Well-intended prosecutors and judicial safeguards do not neutralize the vice of a vague law."

What was true for a lawyer in *Spevack v. Klein*, — U.S. —, 17 L.Ed.2d 574, 87 S.Ct. — (1967), is equally true for a mariner:

> "*** the Self-Incrimination Clause of the Fifth Amendment *** extends its protection to lawyers as well as other individuals, and *** it should not be watered down by imposing the dishonor of disbarment and the *deprivation of a livelihood* as a price for asserting it." 17 L.Ed.2d at 577 (Emphasis added).

The same principle was applied by this Court in *Garrity v. New Jersey*, — U.S. —, 17 L.Ed.2d 562, — S.Ct. — (1967):

> "The option to lose their means of livelihood or pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." 17 L.Ed.2d at 565.

B. *The Existing Regulations Fail to Provide Confrontation of Adverse Witnesses and Adequate Notice of the Government's Case Against the Workman.*

The fundamental failure of due process in *Parker v. Lester*, above, p. 11, was the denial of adequate notice and hearing to the applicants. The court there noted that under the existing system, "there is no provision whatever for notice and an opportunity to be heard as generally understood to be required by the provisions of the Fifth Amendment relating to due process" (at 716). In response to that decision, the regulations were amended to provide some additional information to the seaman prior to his hearing before the various boards in the screening process. However, the regulations still fail to provide adequate notice or confrontation. *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959), establishes the constitutional requirement of adequate notice, confrontation, and cross-examination in employment-screening programs. However, the Coast Guard regulations now permit Hearing Boards (the initial panels

that pass upon contested cases) to withhold information from confidential sources. 33 C.F.R. §121.19(g), p. A-18 below, provides in relevant part: "If the applicant or holder is, or may be handicapped by the *nondisclosure to him of confidential sources*, or by the failure of witnesses to appear, the Hearing Board shall take the fact into consideration." (Emphasis added.) 33 C.F.R. §121.19(f), p. A-18 below, provides: "Every effort should be made to produce material witnesses to testify in support of the reasons as set forth in the notice of the Commandant [to applicants, stating reasons for denying the application for special validation], in order that such witnesses may be confronted and cross-examined by the applicant or holder."

It is evident, however, that subsection (g) permits the Hearing Board to rely on confidential information secured from any source and appearing in the dossier of the seaman as presented to the Hearing Board by the Commandant. Thus, the regulations still fail to provide for full and fair hearings, and therefore fail the tests of *Parker* and *Greene v. McElroy*, and fail to avoid the vice of faceless informers. The procedures still lack due process, the regulations are vitiated by this lack, and the screening program violates the Fifth and Sixth Amendments.

III. The Statute, and the Regulations Issued Under It, Are So Vague As To Be Incapable of Understanding, and Therefore Violate Substantive Due Process.

A. *The Magnuson Act Is Fatally Vague As to the Conduct To Be Regulated.*

The statute in relevant part authorizes the President to issue rules and regulations "to safeguard against destruction, loss, or against injury from sabotage, subversive

acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities." At this point, we may assume that the terms "sabotage" and "accidents" have a relatively clear meaning. However, in using the phrase "subversive acts . . . or other causes of similar nature" the statute goes far beyond any clearly understood phrases and authorizes the issuance of regulations that cannot and do not have a clearly understood or understandable meaning.

The statute appears to authorize the executive to screen off seamen and others from vessels, wharves, ports, and harbor facilities, for some reason. The statement of the reason nowhere appears in the statute in terms such that a person of ordinary understanding can predict what conduct or omission will incur the displeasure of the President or his delegate. Indeed, it is not plain from the statute whether past conduct, previously unexceptional, now gives cause for prevention of private employment (See p. 54 below).

"Subversive acts . . . or other causes of a similar nature" is neither self-defining nor defined.

Legislative use of "subversive" as a definition of prohibited or disabling conduct by employees or would-be employees has repeatedly led this Court to find such legislation unconstitutionally vague. Thus, in *Baggett v. Bullitt, supra,* p. 19, "subversive" persons were barred from public employment in the State of Washington. "Subversive person" was defined at length (R.C.W. 9.81.060, 377 U.S. at 362 and n. 1, 363). The Court found that Washington statute void for vagueness, 377 U.S. at 367-371, owing precisely to the use of the word "subversive" and the absence of any understandable definition thereof.

So also, in *Whitehill v. Elkins*, — U.S. —, 36 U.S. Law Week 4006, CCH U.S. S.Ct. Bulletin B 167-175, No. 25, Oct. 1967 Term, decided 6 Nov. 1967, where the Court struck Maryland's Ober Act, Art. 85A, Md. Anno. Code 1957, which uses in §13 the same vague phrase "subversive" to describe disqualifying conduct. Of that act, Justice Douglas wrote for the majority, "As we have said in like situations, the oath required must not be so vague and broad as to make men of common intelligence speculate at their peril on its meanings." (CCH Bulletin, B 170, p. 4 of slip sheet.) *Cf. Elfbrandt v. Russell*, 384 U.S. 11, 16 L.Ed.2d 321, 86 S.Ct. 1238 (1966); *cf. Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967), where a complex statutory employee-screening program under New York's Feinberg Law was struck down, in part for its use of "subversive", "seditious", and other vague standards. The court referred to "the uncertainty as to the scope of [the statute's] proscriptions . . . as to the utterances and facts proscribed," 385 U.S. at —, 17 L.Ed.2d at 639.

B. *The Regulations Speak in Language Already Ruled By This Court To Be Unconstitutionally Vague.*

The seaman who turns to the regulations to learn what conduct or omissions are forbidden finds that as translated in the regulations, "subversive acts" becomes acts "inimical to the security of the United States" and the major thrust of the regulations is to "screen" those whose political advocacies or associations or utterances are deemed to be undesirable in the view of the author of the regulations. It is not insignificant that in 33 C.F.R. §121.03(b) the vague and ominous word "sedition" appears. The would-be applicant is told that no person

shall be issued merchant mariner documents, port security cards, or special validation "unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States." "Inimical", a term having no definite meaning (*Cf. Keyes v. Carrick*, 268 S.W.2d 397 (Ct.App.Ky. 1954) is nowhere specifically defined in the regulations. However, the regulations do provide some possible clue as to the type of conduct which will perhaps be regarded as "inimical" and must be avoided by seamen seeking employment aboard U. S. flag vessels. The forbidden conduct is described in the five standards set out in 33 C.F.R. §121.03, p. A-13 below:

> "(a) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means.
>
> "(b) Commission of, or attempts or preparations to commit, an act of espionage, sabotage, sedition, or treason, or conspiring with, or aiding or abetting another to commit such an act.
>
> "(c) Performing, or attempting to perform, duties or otherwise acting so as to serve the interest of another government to the detriment of the United States.
>
> "(d) Deliberate unauthorized disclosure of classified defense information.
>
> "(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended."

No other acts or omissions are anywhere defined in the regulations.

Subsection (a), warning as it does against advocacy of alteration of the government by unconstitutional means, leaves completely unclear the meaning of the expression "unconstitutional means".

Does this language mean the force and violence condemned in *Dennis v. U.S.*, 341 U.S. 494, 95 L.Ed. 1139, 71 S.Ct. 857 (1951), although the term "force and violence" is nowhere used in the regulation? Does it mean *non*-constitutional means, such as political pressure, partisan politics, or public demonstrations? Does it include, as it did in *Keyishian v. Board of Regents*, p. 31 above, "mere advocacy of abstract doctrine"?

Subsection (b), read with care, creates as one of many questionable standards for determination of unsuitability for employment, the aiding of another to commit an act of sedition. It was precisely this indirect aid that the court found vague and objectionable in *Baggett v. Bullitt, supra*, p. 19. There, forbidden conduct included abetting another in the alteration of the constitutional form of government of the United States.

The court pointed out the impossibility of determining whether such statutory language was intended to cover "guiltless and knowing behavior", innocent acts that might indirectly result in the furtherance of possibly unlawful goals.

The use of the word "sedition" adds an additional dimension of vagueness to subsection (b). Where the comparable phrase "seditious words" was used in the Feinberg law, the court held in *Keyishian v. Board of Regents, supra*, p. 31, that the language was "danger-

ously uncertain" (17 L.Ed.2d at 637)—that is to say, unconstitutionally vague. See also *N.Y. Times v. Sullivan*, 376 U.S. 254, 273-276, 11 L.Ed.2d 686, 702-704, 84 S.Ct. 710 (1964). These provisions clearly have the same defects of vagueness as the statute stricken down in *Keyishian*. These provisions are "plainly susceptible of sweeping and improper application", prohibiting "the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others or incite others to action.". *Keyishian*, 17 L.Ed.2d at 638.

Another, even vaguer warning is given in (b) against "preparations to commit an act of . . . sedition"—what is meant by such a phrase?

It is difficult to understand what conduct is "defined" in subsection (c) that is not covered by others of the subsections.

Subsection (e) raises major questions of vagueness; the phrase "affiliation" and the phrase "sympathetic association" are both without understandable content, and are so vague as to be without meaning. Does "affiliation", does "sympathetic association", apply to cooperation with a proscribed organization in its wholly lawful activities? There is no support in the regulations for any contrary understanding. No reference is made to any other regulation or to any statute to supply a definition for either phrase. As was said in *Bridges v. Wixon*, 326 U.S. 135, 89 L.Ed. 2103, 65 S.Ct. 1443 (1945):

> "Individuals, like nations, may cooperate in a common cause over a period of months or years though their ultimate aims do not coincide. Alliances for limited objectives are well known."

If "sympathetic association" and "affiliation" have narrow meanings, those meanings do not appear in the standard. If they have broad meanings, serious constitutional questions are immediately raised. (*Cf. Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Baggett v. Bullitt, supra*, p. 19; *Elfbrandt v. Russell, supra*, p. 31; *Keyishian v. Board of Regents, supra*, p. 31.

The ultimately fatal vice both of the statute and the regulations is that they provide no standard by which appellant and other would-be merchant mariners can regulate their conduct prior to seeking a special validation, so as to be sure that they are not subject to being screened off. It is obvious, of course, that any attempt to avoid conduct that may be regarded as "inimical" means steering wide of any conduct which could be deemed controversial in the exercise of First Amendment rights. See *Speiser v. Randall*, 357 U.S. 513, 526.

Between 1942 and 1949, appellant sailed on U.S flag vessels in various capacities, ranging from wiper to second assistant engineer. From 1949 until his application for a special endorsement was made, he had not sailed on U.S. flag vessels. During the great bulk of that time, of course, the Magnuson Act and the Coast Guard's regulations purporting to put flesh on the legislative bones of the Magnuson Act were in effect. During appellant's absence from the maritime industry, how should he have conducted himself so as not to run afoul of 33 C.F.R. part 121, should he decide, at a later date, to apply for a special endorsement? What political activity was he permitted to engage in and what political activity was he for-

bidden to engage in? Could he derive the answers to such questions by examining the phrase "subversive activities" in Executive Order No. 10173? What should he have done so that his "character and habits of life" would "not be inimical to the security of the United States" during the time that he was away from the sea? What activity is permitted and what activity forbidden by such language as this? Was the reading of the *"Peoples' World"* forbidden? Was it a relevant factor? Should appellant have understood that he read the *"Peoples' World,"* or subscribed to the *"Peoples' World,"* or engaged in activities "in its behalf" at his peril? (J.A. 35.)

It is appellant's contention that the regulations and the executive order gave him no warning as to what conduct would and would not be taken into account at such time as he might choose to apply for a special endorsement. Are not mariners as entitled to a fair warning concerning potential loss of livelihood as are sit-in demonstrators at Southern lunch counters? (*Cf. Bouie v. Columbia*, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1967 (1964).) The fact that appellant is not being prosecuted for a crime does not change the rules for precision in the governing regulations. See for example *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925).

A careful mariner knowing of the broad, vague, and threatening language from the regulations must make a decision either to run the severe risk of loss of employment or of foregoing constitutionally protected activities so as to stay on the safe side of an uncertain boundary between the licit and the illicit.

C. *Administrative Application of the Regulations Has Not Cured Their Vagueness But Instead Has Raised New Problems of Vagueness.*

It cannot be argued that the vagueness of the regulations has been cured by their administrative application. In case-by-case application, it appears that the Commandant seeks to require merchant mariner applicants for special validation to answer special interrogatories couched in language that is, if possible, even more vague than the regulations themselves. Seven special interrogatories were posed to appellant: all are discussed below. Among them, however, the following seem especially vague:

No. 5 "What is your present attitude toward the Communist Party?"

No. 6 "What is your present attitude toward the principles and objectives of communism?"

No. 7 "What is your attitude toward the form of Government in the United States?"

To require what amounts to essays on these topics as a condition of employment on shipboard is a high point in fatuity and emphasizes the lack of clarity and precision in the government's search for possibly disqualifying attributes of the would-be seaman.

To take interrogatory Number 6, as an example, who is to define "the principles and objectives of communism"? Restricted, as the government has attempted to restrict it, to the "principles of Marxism—Leninism"[8] the appellant still has no guide as to whose understanding of these principles is to be used as an appropriate starting point for the essay. The teaching of numerous cases is that the

8. Only in an answer to an interrogatory after this litigation was begun. Answer 22, R. 41.

political movements in the United States advocating the principles of communism have many lawful, as well as some possibly unlawful, principles and objectives. Which principles and objectives are the relevant ones for discussion?

The word "communism" itself means many things to many people. It is so vague, indeed, that numerous political parties have sprung up around the world, each asserting that it and only it has a full and correct understanding of the implications of the term. The Commandant understands this term to mean "Marxism-Leninism", but he has not seen fit to communicate that understanding in his interrogatories to the applicant.

In each of the interrogatories the use of the word "attitude" raises problems of definition. The applicant after all is being asked to define his attitude in terms of the Commandant's understanding of what that word may mean. This is no easy task.

D. The Statute and Regulations Require Appellant to Choose Between the Penalty of Perjury Prosecution in Answering Vague Questions and the Penalty of Relinquishing His Right to Seek Private Employment.

The statute and regulations require Schneider to navigate through a minefield of criminal penalties before he is permitted to follow his calling. If he ships without his special validation, he is a felon (50 U.S.C. §1928; see *U.S. v. Gray*, 207 F.2d 237 (9th Cir. 1953)). To secure validation, his papers, completed under pains of perjury, 18 U.S.C. §1001, must show that: he forswears past guiltless knowing membership, *cf. Elfbrandt v. Russell*, p. 31 above; he disassociates himself from past "affiliation" or

"sympathetic association" (33 C.F.R. §121.03(e), with groups on the Attorney General's list, when no man can say what acts or through words such as "affiliation" or "association" are designed to include, *cf. Baggett v. Bullitt*, p. 19 above, *Cramp v. Board of Public Instruction*, p. 35 above; he declares himself *not* an advocate of alteration of the government by unconstitutional means (§121.03 (a)); he declares his words and writings free of sedition and he himself innocent of "preparations to commit . . . sedition," *Keyishian v. Board of Regents*, p. 31 above. The Coast Guard asks of Schneider that in his answers to the special interrogatories he make declaration of his political orthodoxy, unswerving conventional loyalty, and innocence of unlawful or other association with radical groups. In effect, he is required to write his own loyalty oath, to meet the shadowy requirements of the Coast Guard.

IV. The Program Threatens Abridgement of Plaintiff's And All Other Seamen's Freedom of Speech And Freedom of Association and Is Therefore Constitutionally Impermissible.

Under the Federal constitutional system, beliefs are inviolate. *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1940). Moreover, since "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . " *NAACP v. Alabama*, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958), this court has repeatedly held that freedom of association is guaranteed by the First Amendment. *Aptheker v. Rusk*, 378 U.S. 500, 12 L.Ed.2d 992, 84 S.Ct. 1659 (1964) (collecting cases). See, Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. I (1964).

These freedoms are protected not only against frontal attack, but also from being stifled by more subtle governmental interference. *Bates v. Little Rock*, 361 U.S. 516, 4 L.Ed.2d 480, 80 S.Ct. 412 (1960). As Mr. Justice Jackson recognized in *Thomas v. Collins*, 323 U.S. 516, 89 L.Ed. 430, 65 S.Ct. 315 (1945), in a concurring opinion:

> "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate, so as to bring the whole within official control. Here, speech admittedly otherwise beyond the reach of the states is attempted to be brought within its licensing system by associating it with 'solicitation.'" (U.S. at 547)

The constitutional right to freedom of association is not to be discouraged by barring one from employment because of the free exercise of such rights. See *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Konigsberg v. State Bar of California*, 353 U.S. 252, 1 L.Ed.2d 810, 77 S.Ct. 722 (1957); *Elfbrandt v. Russell*, 384 U.S. 11, 16 L.Ed.2d 321, 86 S.Ct. 1238 (1966).

In *Cramp*, the U.S. Supreme Court, in holding that a test oath imposed upon state employees was unconstitutionally vague, emphasized that such an oath had a potentially inhibiting effect on free speech. The court wrote, 368 U.S. at 287:

> ". . . the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. As we said in *Smith v. California*, ' . . . stricter standards of permissible statutory vagueness may be applied to a statute hav-

ing a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be loser.'"

Inquiries to seamen made under the regulations intrude into and threaten "the cherished freedom of association protected by the First Amendment" (*Elfbrandt v. Russell, supra,* p. 40). These inquiries are afflicted with "[t]he vice of unconstitutional vagueness . . . further aggravated" by operating in area which "inhibit[s] the exercise of individual freedoms affirmatively protected by the Constitution," *Cramp v. Board of Public Instruction, supra,* p. 40 (368 U.S. at 287).

The inquiries into organizational membership relate to matters, which as we develop further below at pp. 53 to 61, are remote and conjectural with respect to the legislative intent to prevent sabotage. The inquiries are improper "[b]ecause First Amendment freedoms need breathing space to survive, [and therefore] government may regulate in the area only with narrow specificity", *NAACP v. Button,* 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963) at U.S. 432-33.

In other words, inquiries into one's organizational affiliations in matters political are considered to be inquiries into areas protected by the First Amendment. The government intrudes here only with grudging permission of the courts, on showings of the strongest necessity. Here, no such showing has been made. Additionally, the inhibiting effect of government's hostile examination into protected beliefs and associations should be weighed.

If a decision is reached, as can be only rarely, if ever, constitutionally permissible, that an individual may be ex-

cluded from a calling because of his beliefs, or his failure to reveal or explain them to government, such an exclusion must be supported by substantial evidence that he personally subscribes to the impermissible, disqualifying beliefs. It is not enough that he belongs to an organization, some of the objectives of which, if he shared them, would justify his exclusion from employment. See for example *Wieman v. Updegraff*, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215 (1952), where a conclusive presumption of "disloyalty" springing from membership in certain blacklisted organizations was overturned by this Court; innocent membership could not be so punished. But his membership must not only be knowing; it is now well settled that he may be excluded only if it is shown that he had a "specific intent" to further the illegal objectives of the organization or personally participated in the organization's illegal activities. *Elfbrandt v. Russell, supra,* p. 40; *Aptheker v. Rusk, supra,* p. 40. *Cf. Scales v. U.S.*, 367 U.S. 203, 6 L.Ed.2d 782, 81 S.Ct. 1469 (1961); *cf. Noto v. U.S.*, 367 U.S. 290, 6 L.Ed.2d 836, 81 S.Ct. 1517 (1961).

Elfbrandt shows the impropriety of assuming, as the Coast Guard has evidently done, that membership in an organization in and of itself is particularly revealing of one's propensities to do harm, for the court said:

> "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the 'specific intent' to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization. See *Aptheker v. Secretary of State* [*supra,* p. 40, sub. nom. *Aptheker v. Rusk*] at 511. The unconstitutional-

ity of this Act follows *a fortiori* from *Speiser v. Randall*, 357 U.S. 513, where we held that a State may not even place on an applicant for a tax exemption the burden of proving that he has not engaged in criminal advocacy.

"This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the States through the Fourteenth Amendment. . . . A statute touching these protected rights must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.' *Cantwell v. Connecticut*, 310 U.S. 296, 311, 84 L.Ed. 1213, [60 S.Ct. 900, (1940)]. Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved' . . . A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily upon protected freedoms. It rests upon the doctrine of 'guilt by association' which has no place here. See *Schneiderman v. U.S.*, 320 U.S. 118, 136; *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246. Such a law cannot stand." (384 U.S. 817-9)

Nor can regulations issued pursuant to asserted legislative authority do more than a statute requiring an oath disclaimer. The vice of such regulations is two-fold: (1) the Commandant is authorized to treat membership in the proscribed organization as a sole and sufficient disqualifying factor, without being required to take into account the quality and purpose of the seaman's membership in the proscribed organization, (2) the effect of repeated inquiries into the political associations of seamen is certain to have a disabling, inhibiting effect on their exercise of First Amendment rights even under far more normal and common organizational auspices. See *Dombrowski v. Pfister*, above at p. 13.

This problem is taken up in some further detail at pp. 45-48 below dealing with the impact of the specific inquiries propounded to plaintiff after his answers to the initial form were evaluated and in the discussion at pp. 48-55 below on the question of these regulations as constituting a bill of attainder.

Unless it can be assumed that the merchant-seaman screening program in its inquiries about membership in organizations on the Attorney General's list is protected from constitutional challenge by a fiction that all of those organizations advocate only criminal and forbidden ideas and conduct — and it cannot be so assumed — then it follows that the Commandant must inevitably be inquiring of seamen what ideas they advocate that they are lawfully entitled to advocate. The special interrogatories put to appellant (J.A. 34-36) confirm this analysis. Lawful advocacy of ideas in the political, social, and economic spheres is not a proper subject of regulation by government absent a positive showing that the advocacy is likely to be immediately followed by unlawful conduct as a result of the persuasive powers of the advocate or his idea.

The Commandant has not restricted inquiry to the advocacy of unlawful action in such "clear and present danger" situations. He inquires of every seaman whether he belongs or ever belonged to any of the organizations on the Attorney General's list, without any qualification. Such inquiry carries with it the necessary implication that membership in such an organization is regarded by the appellee as having some relevance to the likelihood that one will commit acts of sabotage. To admit member-

ship in one of the organizations is to admit that one is in the suspect class. To join such an organization—and it is the undoubted right of any seaman to do so—is likely to be taken by the Commandant as a sign that one is a potential threat on the waterfront. 33 C.F.R. §121.03 (e), p. A-13 below.

Such hostile, suspicious inquiry into one's political beliefs, reinforced by the sanctions of loss of employment, punishment for perjury, and punishment for shipping out without the necessary validations, can only inhibit freedom of speech, association, and the press in areas of political and social unorthodoxy. Limits may be imposed on freedom of speech, press, advocacy, and associational conduct only when most narrowly and sharply defined. Any statute or regulation that has the vice of overbreadth and vagueness is unconstitutional. *NAACP v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963).

The detailed application of the regulations to appellant by the special interrogatories (J.A. 34-36) demonstrates further that the screening program is a constitutionally impermissible regulation and abridgement of freedom of speech, association and of the press.

The special interrogatories (J.A. 35) demand of appellant that he explain to the Coast Guard if and why he reads a certain newspaper, what he thinks about the government, and what are his inner convictions on weighty matters of social policy—all prior to any showing that he is in any way a dangerous person. Such inquiry, moreover, is not restricted to this one appellant.

The screening program authorizes the Coast Guard to conduct such sweeping inquiries into the past and present

political associations and beliefs of more than 130,000 maritime[9] and dockside workers. These employees of private employers[10] are required as a condition of their initial or continued employment to answer questions under penalty of perjury[11] covering a broad range of political affiliations and a wide spectrum of political attitudes and beliefs, such as the questions put to appellant (J.A.34-36).

If the protection of merchant ships and port facilities justifies screening employees by means of a test of their political beliefs because "there is a vital governmental interest at stake in preventing loss and injury to vessels, ports, and harbors of the Merchant Marine through sabotage and other subversive acts",[12] then the same reason-

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9. In calendar-year 1965 50,894 seamen were employed on United States-flag vessels of 1,000 gross tons and over, exclusive of vessels on inland waterways, the Great Lakes, and exclusive of United States government-owned vessels. Table 887, p. 607, "Statistical Abstract of the United States 1966" (Department of Commerce, Bureau of the Census). Employment figures for the category of United States-flag vessels between 100 gross tons (the minimum gross tonnage covered by the Magnuson Act and the regulations) and 1,000 gross tons are not readily available from official publications, but the number of such vessels is in excess of 11,000. Table 895, p. 611, "Statistical Abstract of the United States, 1966."

As of early 1966, the Coast Guard was receiving some 2,300 requests each month for original documents for seamen; testimony of Capt. Lynn Parker, U.S.C.G., Chief of the Merchant Vessel & Personnel Division of the Coast Guard, at p. 9, "Maritime Manpower Shortage," Doc. H.R. 89-30. At this rate, the Magnuson Act and the Coast Guard regulations are applied to some 28,600 more maritime workers each year.

In addition, the Coast Guard applies virtually identical screening procedures (33 C.F.R. 125.01 *et seq.*) to laborers in the longshoring labor pool ,which included about 88,000 men in 1965. See 1965 annual report of the U.S. Maritime Commission at p. 39.

The screening procedures have thus probably been applied to over a quarter-million workers in the 16 years of the Act's existence.

10. "Of the Federal Government Security programs only one involves persons who are not seeking some action or advantage from the government. That program is the one governing the security of vessels and waterfront facilities. . . ." *Government Security & Loyalty*, 51.1.

11. 18 U.S.C. §1001. See Note 1, *supra*, p. 1.

12. Opinion of the Court below, (J.A. 42).

ing would justify extension of such screening to all the transportation industries, to every industrial facility, should Congress so decide, and indeed even to those using streets and highways where goods needed in defense plants may pass to become targets of sabotage. Thus, the implications of the Act and regulations, upheld by the decision below, vitally affect every citizen in the United States whose occupation or activities take him to any facility which the Congress or the state legislatures (*Cf. Lerner v. Casey*, 357 U.S. 468) may deem vital to the "national defense".

Who can doubt the widespread "chilling effects" upon the exercise of First Amendment rights (*Dombrowski v. Pfister*, 380 U.S. 479, 487) of such a program? The only safe course for any of the hundreds of thousands of affected workmen who wishes to pursue his calling without serious risk of being forever barred from the waterfront or from crew membership, is to eschew any conduct that the Coast Guard might regard as "subversive" or "sedition"; any expression of political opinion; any association with known radicals; any reading of papers, books, or magazines suspected of disseminating unorthodox views, or indeed any attitudes basically critical to either past or prevailing policies of the government in conduct of national or international affairs. But it is the teaching of *Dombrowski* that in our system "free expression [is] of transcendent value to all society, and not merely to those exercising their rights," *Dombrowski, Elfbrandt v. Russell, supra*, p. 40, *Baggett v. Bullitt, supra*, p. 19 and *Cramp v. Board of Public Instruction, supra*, p. 40 were all decided following the last Court of Appeals decision interpreting the Magnuson Act. These decisions and *Keyishian*,

decided after the judgment below, in our opinion represent the view of this court that the values of free expression, communication, and exchange of ideas far outweigh any possible benefits which may be derived from an overzealous concern as to whether persons of present or past radical sympathies may, in some instances (and as we show below, pp. 58 to 59 potentially, rather than actually) pose any threat of any kind to the security of the United States as applied to shipping. These cases forbid the kind of unnecessary prying attempted here.

V. The Act, If It Authorizes the Regulations, Is a Bill of Attainder or an *Ex Post Facto* Law

A. *The Use of the Attorney General's List of Subversive Organizations, If Authorized by the Act, Amounts to an Attainder*

The screening program as applied in this case rests in part upon the use of the Attorney General's list of subversive organizations as a means of determining whether a seaman or ship's officer shall be qualified for employment. The "standards" set forth in 33 C.F.R. §121.03 (p. A-13 below, and p. 33 above) specifically provide that a factor which "may preclude" qualification of a seaman is "membership in or affiliation or sympathetic association with" an organization on the Attorney General's list. The regulations thus give the Commandant the right to exclude an applicant solely on the basis of membership in, or affiliation or association with, an organization on the list. This procedure, if authorized by Congress, as the lower court held it had been, bears the earmarks of a bill of attainder.

Clause 3 of Section 9 of Article I of the United States

Constitution (p. A-20, below) unqualifiedly forbids Congress to pass a bill of attainder in the following words:

> "No Bill of Attainder or ex post facto Law shall be passed."

Although attainder had the historical meaning of punishment by death, the landmark case of *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277, held that its use in the Constitution was broader.

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.

In *U.S. v. Lovett*, 328 U.S. 303, the court held that legislative exclusion of named people from public employment violated the prohibition against bills of attainder. In *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277, 18 L.Ed. 356, and in *Ex parte Garland*, 4 Wall. (U.S.) 333, 18 L.Ed. 366, it was held that legislative exclusions of classes of persons from private employment (Cummings had been barred from acting as a priest and Garland sought readmission to the bar of the U.S. Supreme Court) were in each instance bills of attainder. It was intimated by Mr. Justice Black in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 at 143-44, that the proscription of named organizations by executive action has the characteristics of a bill of attainder. In *U.S. v. Brown*, 381 U.S. 437, the court struck down as a bill of attainder an act making it unlawful for one to serve as an employee or officer of a labor union if one was a member of a legislatively named organiza-

tion. Almost every bill of attainder case in this Court, from *Cummings v. Missouri*, to *U.S. v. Brown* involved legislative efforts to erect bars against employment because of past acts and associations. Legislative deprivation of employment is punishment, and such punishments imposed on named persons or on members of named organizations are attainders.

Thus, the prohibition against bills of attainder forbids the legislature to bar one from public or private employment by reason of membership in a proscribed organization. If the legislature were to name 270 organizations, rather than one, the act would nonetheless be a bill of attainder.

Here, the executive, claiming to act under Congressional authority, the Magnuson Act, asserts the right to exclude persons from private employment because of membership in (or affiliation or association with) any of a large number of organizations that have been named by the executive, also under asserted Congressional authority. If Congress had in terms named all the organizations on the Attorney General's list and then barred past or present members thereof from private maritime employment, such an enactment would have been a bill of attainder. *U.S. v. Brown*, p. 49 above. May the Congress delegate to the executive a power that the Constitution forbids the Congress itself to exercise? As was said in *U.S. v. Brown.*:

> "In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics." (381 U.S. at 455)

The Commandant has attempted precisely to use membership in the organizations on the list as such an equivalent expression.

His acts are more subtle than the crude measure struck down in *Lovett*. They share some of the essential characteristics of *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 95 L.Ed. 817, 71 S.Ct. 624 (1951). In that case, the Court held that the attempt of the Attorney General to add three groups to his list of "subversive" organizations, for use of the Loyalty Review Board of the U.S. Civil Service Commission, was constitutionally improper, being arbitrary and capricious, and lacking due process of law as to the three organizations.

Justice Black, in one of the five opinions filed by the majority in *McGrath*, noted

> "officially prepared and proclaimed governmental blacklists possess almost every quality of bills of attainder, the use of which was from the beginning forbidden to both national and state governments. U.S. Const., Art. I, §§9, 10. It is true that the classic bill of attainder was a condemnation by the legislature, following investigation by that body, see *United States v. Lovett*, 328 U.S. 303, 90 L.Ed. 1252, 66 S.Ct. 1073, while in the present case the Attorney General performed the official tasks. But I cannot believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution.
>
> "There is argument that executive power to issue these pseudo-bills of attainder can be implied from the undoubted power of the Government to hire and discharge employees and to protect itself against treasonable individuals or organizations. Our basic law, however, wisely withheld authority for resort to

> executive investigations, condemnations, and blacklists as a substitute for imposition of legal types of penalties by courts following trial and conviction in accordance with procedural safeguards of the Bill of Rights." 341 U.S. at 143-5 [footnotes omitted]

The attempt to *add to* the Attorney General's list by fiat was thus defeated. But the original list was promulgated by fiat, without notice or hearing, without judicial review, or any other slight shred of due process.

The merchant-marine screening program is valid, if at all, only because it has been authorized by the Congress. Neither the President nor the Coast Guard has inherent power to regulate employment of seamen. That power resides, in the Federal government, solely with the Congress. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 574, 96 L.Ed. 1153, 72 S.Ct. 863, 26 A.L.R.2d 1378 (1952). Subject to constitutional principles of delegation of powers, the Congress may authorize executive agencies to administer regulatory programs. Such programs can only be administered within the parameters of Congressional authority; what is done lawfully by such agencies is done *as if* the acts were those of Congress. Needless to say, Congress cannot authorize the President or lesser officials to do what is forbidden to Congress itself. See concurring opinion of Mr. Justice Douglas in *Peters v. Hobby*, 349 U.S. 331, at 352, 99 L.Ed. 1129, 75 S.Ct. 790 (1955).

It is the necessary position of the Commandant that he is authorized by statute to conduct the inquiries of which plaintiff here complains, for without such authority, express or implied, he acts beyond the law. Might then the Congress do what the Commandant claims that he may

do? Could the Congress designated suspect organizations *by name*? Such a listing, without opportunity for hearing and without notice, has already been forbidden to Congress by *Joint Anti-Fascist Refugee Committee v. McGrath, supra,* p. 51 and is therefore forbidden to appellee.

The most recent bill of attainder case from this Court is *United States v. Brown,* 381 U.S. 437, 14 L.Ed.2d 484, 85 S.Ct. 1707 (1965). There Congress endeavored to bar from certain kinds of employment in labor unions persons who were then or had during the last five years been members of the Communist Party. The statute, 29 U.S.C. §504, §504 of the Labor-Management Reporting and Disclosure Act of 1959, made it a crime for Communists to serve in all but the least significant posts in a labor union.

Brown, a well-known and avowed Communist, was convicted under the statute. His conviction was reversed by the Court of Appeals for the Ninth Circuit, with instructions to the district court to dismiss. The government brought the case to this court on certiorari, and the Ninth Circuit was upheld on the ground that the act was a bill of attainder within the meaning of the Constitution, Art. I, §9, cl. 3, and *Cummings v. Missouri, supra,* p. 49, and *Ex parte Garland, supra,* p. 49. The court's analysis shows that the naming of a particular organization creates an easily ascertainable group, within the doctrine of *Lovett.*

In the case at bar, the Coast Guard, acting as the arm of Congress, asserts the right to bar employment not only to past and present members of the Communist Party, but

also to past and present members of some 270 to 280 other organizations on the Attorney General's list. It has been said that even if a bill of attainder reaches all the persons possessing the characteristics that the legislature finds objectionable, and even if the basic legislative goal is proper, the act is not thereby saved from being a bill of attainder. Note 23, *United States v. Brown*, 381 U.S. at 489. Thus, a bill of attainder will not be saved from its proper fate because it attaints many rather than few.

Is the situation changed if Congress says, as the Commandant must maintain that it does say, that membership in one or more of the suspect organizations *may* (rather than *must*) be used as a decisive standard for depriving plaintiff and others of their rights to employment? We think not. A bill of attainder is no less prohibited by the Constitution because the President or some other, lesser functionary can waive its provisions. The President could have pardoned Archie Brown. The critical test to be applied is that one or more persons are named or defined by their membership in a specified organization, and that such naming or definition is authorized by the legislature to be used as a determinative bar from employment. The use of the arbitrary Attorney General's list by the Commandant, if authorized by the Magnuson Act, amounts to the act of the Congress and is a bill of attainder.

B. *The Commandant's Regulation Authorizing Use of the Attorney General's List Amounts to Ex Post Facto Regulation and Is Therefore Constitutionally Forbidden.*

The regulations (33 C.F.R. 121.03(e) p. A-13 below), authorize the use of the Attorney General's list, based as it

necessarily is on a determination made by the Attorney General (without notice or hearings) prior to the issuance of the regulations or the passage of the Magnuson Act. The list is necessarily based on events that predate its promulgation, and thus the regulations authorize the Commandant to bar appellant from employment on the basis of events—most or all of them lawful when done—that occurred long before the passage of the Act. Administrative pains and penalties may not thus be imposed for acts and associations lawful when they occurred. Such punishments, such regulations, are ex post facto and constitutionally forbidden.

VI. First Amendment Freedoms May Be Restricted, If At All, Only Upon a Showing of Urgent Need.

The Act and the regulations issued under it, we have shown, have an undoubted chilling effect on freedom of speech, press, and association, and on the fundamental right of belief that is posited by the First Amendment. Restrictions of those rights by statute may be upheld only upon a showing of urgent need, whether described in terms of Justice Holmes' famous "clear and present danger" test (*Schenck v. United States*, 249 U.S. 347, 63 L.Ed. 470, 39 S.Ct. 247 (1919)) or one of the more current formulations. Government must show a peril to be guarded against by the statute and a reasonable nexus of relevancy between the peril and the deprivation of constitutionally protected freedoms. Administrative procedures under such a statute must meet the same tests.

However, here, the inquiries made of plaintiff by defendant are neither relevant to the purpose of the screening program nor necessary to achieving its stated goals.

A. *The Legislative Purpose of Congress Was Narrowly Limited.*

The thrust of the Magnuson Act is to permit the President to prevent destruction or injury to vessels and to dock and harbor facilities. See pp. 29-30 above, pp. A-1, A-2. There is no suggestion in the statute that it is aimed at labor disturbances or at seditious propaganda or at espionage or any other form of criminal activity except deliberate physical destruction of vessels and facilities. The brief legislative history indicates that the purpose of the Magnuson Act was to amend the existing law by authorizing the President to institute measures and issue regulations to safeguard against sabotage or injury to harbors, ports, and waterfront facilities, including accidental injury, as well as to vessels, and in technical peace-time without declaring a national emergency. The prior law applied only to vessels and only when the President declared a national emergency. The primary effect of the amendments was so stated in the Senate report accompanying the bill (Senate Report No. 2118, July 21, 1950, 56 Cong. 1st Sess.) and in House Report No. 2740, July 25, 1950, 56 Cong., 1st Sess. Viewed in the light of the purposes of the Magnuson Act the techniques of control set up by the Coast Guard stray far from the legislative intent. The standards set up by 33 C.F.R. §121.03 are not specifically directed at harm to vessels or port facilities, but are aimed at far broader targets. The standard for the Commandant's consideration is whether or not the "presence on board vessels of the United States" of the mariner would "be inimical to the security of the United States". Whether these words have any clearly understandable meaning (see discussion above, pages 31 to 38), it is clear they go well

beyond the question of destruction of vessels.

Thus, the relevance of even the commission of an act of espionage (one of the standards found in §121.03) is doubtful. The advocacy of the overthrow or alteration of the government of the United States by unlawful force or violence, if this is the meaning of "unconstitutional" as used in standard §121.03(a) of the regulations, may arguably have relevancy to risk of deliberate harm to a vessel of the United States. Certainly, the risk of *accidental* harm to a vessel or to a dock because of a person's political beliefs is nil. The risk of deliberate harm depends upon a showing that certain beliefs will result in certain actions. Standard (b) "performing or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the United States" would seem to have no demonstrable relevance to the risk of accidental or deliberate harm to a vessel.

The consideration of whether a man would be "inimical to the security of the United States" has to do with a far broader range of inquiry than the Magnuson Act contemplates. One given to garrulity about classified information in his cups might be a dangerous man to employ as the director of public information for a strategic air command base or as a diplomat, but his infirmity in that respect cannot be said to demonstate anything at all about the possibilities of his inflicting deliberate harm on ships.

B. *The Inquiries Directed to Plaintiff Relate to Possible Membership in the Communist Party a Decade Ago and Are Irrelevant, There Being No Connection Between Such Past Membership and Present Risk of Sabotage by Plaintiff.*

With regard to Special Interrogatories 3 and 4 (J.A. 35), does appellee contend that one's predisposition to sabotage vessels or ports can be predicted from one's political reading matter? If so, what are the psychological text books so stating? Or does the government aver that "*People's World*" endeavors to incite its readers or supporters to acts of violence? If so, can the government show that such incitement has been or will be successful? In the absence of a detailed factual showing, such propositions must be dismissed as irrelevant and fallacious speculations, unworthy of further attention.

Of more moment are the issues raised by Special Interrogatories 1, 2, 5, 6 and 7. These inquiries addressed to plaintiff's admission, through counsel, that ten years or more ago he belonged to the Communist Party.

But such an admission is no foundation for these inquiries which can properly relate only to matters of fact relevant to a determination as to whether plaintiff is a potential saboteur.

In point of fact there is no basis for an assumption of any relationship between Communism and sabotage, and the government has made no effort to show such a connection.

It is safe to say that never in history has such intensive and extensive investigations by governmental agencies been conducted into any area of human association, advocacy and activity as have been made of the Communist

Party in this country. Despite this vast effort we confidently assert that the government cannot point to a single act of sabotage or other act of similar nature in which a Communist was even suspected.

To sustain its position it is incumbent on the government to show that the sweeping and vague inquiry into the present mental state of the appellant here on issues such as Communism, the form of government of the United States, or into the affiliations and associations that he may have had ten years prior to his present application for employment, have a reasonable and substantial relationship to whether he is a person likely to commit sabotage or otherwise intentionally to injure shipping or shipping facilities if he is employed at his vocation as a seaman.

The interrogatories to appellant in this case have no relation to the object of prevention of sabotage. Plaintiff's loyalty to the United States and his disassociation from organizations regarded as subversive are not matters that the government contests (J.A. 14). Since there is no reasonable or substantial relationship between the questions put to the appellant plaintiff under the regulations and the object sought to be obtained by Congress—prevention of sabotage—any regulation purporting to refuse clearance to appellant for shipping for the answers to questions of this type is void as a denial of due process.

VII. The Regulations of Appellee Are Not Authorized

A. *Congress Has Not Authorized the Merchant Seamen's Screening Program.*

The Coast Guard's program for the screening of merchant seamen and waterfront workers is singular, at least

among Federal loyalty programs, in effectively excluding an individual from a field of private employment in the absence of explicit statutory authority. The purported statutory authority for the program is the Magnuson Act, 64 Stat. 427 (1950), 50 U.S.C. §191 (1964), upon which both Exec. Ord. 10173 and the regulations thereunder rest.

The stated purpose of the Act is to safeguard shipping and port facilities against physical destruction, loss, or injury "from sabotage or other subversive acts, accidents, or other causes of similar nature."

There is no suggestion in the wording of the Act that its framers intended to authorize the type of sweeping political inquiries that have been directed to the appellant in this case or to seamen, longshoremen, and stevedores generally.

Since the Coast Guard screening program clearly impinges upon rights protected by the First Amendment, "precision or regulation must be the touchstone in an area so closely touching our most precious freedoms", *NAACP v. Button*, 371 U.S. 415, 438. Thus, if Congress had intended to establish a legislative equivalence between certain political beliefs or activities and a disposition to cause physical harm to shipping facilities, it must be presumed that the legislation would have been drawn with precision to define and limit such intended equivalence with sharp and clear definitions. The court has previously held that it will not assume that security clearance programs that fail to afford full due process have been authorized.

"Without explicit action by lawmakers, decisions of great constitutional import and effect would be

> relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene v. McElroy*, 360 U.S. 474 at 507.

See also *Peters v. Hobby*, 349 U.S. 331, and cf. *Kent v. Dulles*, 357 U.S. 116.

It may well be that language no less broad than that of the Act would suffice to authorize an administrative program regulating a phase of the economy. This, however, is not such a case. Here the administration of the loyalty program inhibits the exercise of freedoms guaranteed by the First Amendment. This Court has indicated that it will not readily impute to Congress an intent to authorize an administrative official to restrict an individual's liberty on the basis of his beliefs and associations. *Kent v. Dulles, supra*, and see also *Cole v. Young*, 351 U.S. 536, 546-47, 100 L.Ed. 1396, 76 S.Ct. 861 (1956). In *Kent v. Dulles*, the Court refused to infer from general statutory language providing that "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe . . ." and prohibiting a citizen from entering or leaving the United States without a passport, that Congress had authorized the Secretary of State to restrict the liberty to travel on the basis of beliefs and associations.

Moreover, exclusion from employment as a security risk is tantamount to imposition of a criminal penalty. It is a "badge of infamy" which operates to exclude the person so classified from any desirable employment. *Wieman v. Updegraff*, 344 U.S. 183, 190-91, 97 L.Ed. 216, 73 S.Ct. 215 (1952); *Peters v. Hobby*, 349 U.S. 331, 351-2, 99 L.Ed. 1129, 75 S.Ct. 790 (1955) (Douglas, J., concurring):

"We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where goverment with all its power and authority condemns a man to a suspect class and the outer darkness. . . . [O]ne of man's most precious liberties is his right to work. When a man is deprived of that 'liberty' without a fair trial, he is denied due process. If he were condemned by Congress and made ineligible for government employment, he would suffer a bill of attainder, outlawed by the Constitution. . . . An administrative agency—the creature of Congress—certainly cannot exercise powers that Congress itself is barred from asserting."

B. *Congress Did Not Authorize the Procedures Outlined in the Regulations or the Methods Followed by the Coast Guard in This Case.*

Even if the Magnuson Act did authorize the creation of a personnel screening program, it cannot be lightly assumed that Congress intended to authorize the existing program. It is well settled in security-clearance cases that in the absence of express Congressional authorization it will not be inferred that Congress intended to authorize a Governmental agency to dispense with traditional forms of fair procedure. *Cole v. Young, supra,* p. 61, *cf. Greene v. McElroy, supra,* p. 61.

In *Greene v. McElroy* the Court held that in the absence of explicit authorization the Department of Defense was not empowered to refuse security clearance in a proceeding in which the applicant was not afforded the safeguards of confrontation and cross-examination. The Court emphasized the importance of these rights, stating, 360 U.S. at 497:

". . . This Court has been zealous to protect these

rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny."

C. ***If Congress Authorized the Screening Program, There Has Been an Unconstitutional Delegation of Legislative Authority.***

The executive's authority, if any, for creation of the merchant marine personnel screening program, comes from the following language of the Magnuson Act:

> "Whenever the President finds that the security of the United States is endangered by reason of *** subversive activity, *** the President is authorized to institute such measures and issue such rules and regulations –
>
> ***
>
> "(b) To safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States."

Under such a statute, neither the President nor the courts can say what the standards are by which the President is to accomplish Congress' purpose. The limits of the President's authority are nowhere indicated, and there is no way in which he can understand those limits. In the absence of such standards and limits, the delegation of authority is overbroad. *United States v. Rock Royal Cooperative*, 307 U.S. 533, 83 L.Ed. 1446, 59 S.Ct. 993 (1939). No class of persons to be regulated is defined or suggested by the Act. The declared policy of the Act – to prevent deliberate damage from "subversive acts" – carries

no suggestion as to the means to be employed by the President. No indication of "the necessity, time, and occasion of performance" of the President's delegated powers is given. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440, 79 L.Ed. 388, 55 S.Ct. 241 (1935). The delegated power is "unconfined and vagrant," see concurring opinion of Cardozo, J., in *A.L.A. Schecter v. United States*, 295 U.S. 495, 551, 79 L.Ed. 1570, 55 S.Ct. 837 (1935).

One cannot tell what has been delegated, who is to be affected, and how long and in what areas regulations are to be in force.

The question of delegation of powers that is here raised is the other side of the coin of the question of vagueness of standards. In the area of exercise of First Amendment freedoms, rights may be affected only by narrowly drawn and specifically defined legislative guidelines for administrative officers. See *Lovell v. Griffin*, 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1938); *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1940); *Saia v. New York*, 334 U.S. 558, 98 L.Ed. 1574, 68 S.Ct. 1148 (1948); Cf. *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959).

In terms of the regulation between the legislative and executive branches of government, the question is, has the legislature abdicated its authority to create "standards for the exercise of discretion" (*Saia v. New York, supra*), to the administrator; such abdication is an unconstitutional delegation of power, especially in the area of First Amendment rights. From the standpoint of the affected individual, the question is, can he look to the statute, and discover what conduct the administrator is authorized to proscribe?

If a man of ordinary understanding cannot so discover, the statute is unconstitutionally vague. Where the legislature delegates broad authority to the executive to regulate freedom of speech, association, or press, the delegation is likely to be unconstitutional and the statute to be void for vagueness.

Congress, if it delegated such authority, did so in violation of Article I, Section 1, of the Constitution, which provides that "All legislative powers . . . shall be vested in a Congress of the United States," has delegated to the President the authority which resides solely in Congress to enact a broad legislative program, and has failed to provide any specific guidance or limits to executive discretion.

CONCLUSION

For each of the foregoing reasons, the judgment of the district court should be reversed with directions to grant appellant injunctive relief against the application of the Magnuson Act and regulations 33 CFR parts 6 and 121 to appellant, to order the immediate special validation of appellant's merchant mariner documents, and to proceed with the trial of the balance of the case.

Respectfully submitted,

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APPENDIX

U.S. CONSTITUTION

(The relevant portions of the Constitution appear at pp. A-20 to A-21 below.)

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50 U.S.C. §191 Regulation of anchorage and movement of vessels during national emergency

Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

Within the territory and waters of the Canal Zone the Governor of the Canal Zone, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury.

Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations—

(a) to govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the

United States, to inspect such vessels at any time, to place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof;

(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States. Any appropriation available to any of the Executive Departments shall be available to carry out the provisions of this chapter. June 15, 1917, c. 30, Title II, §1, 40 Stat. 220; Aug. 9, 1950, c. 656, §1, 64 Stat. 427; Sept. 26, 1950, c. 1049, §2(b), 64 Stat. 1038.

EXECUTIVE ORDER 10173

REGULATIONS RELATING TO THE SAFEGUARDING OF VESSELS, HARBORS, PORTS, AND WATERFRONT FACILITIES OF THE UNITED STATES

By virtue of the authority vested in me by Public Law 679, 81st Congress, 2d Session, approved August 9, 1950, which amended section 1, Title II of the act of June 15, 1917, 40 Stat. 220 (50 U.S.C. 191), and as President of the United States, I hereby find that the security of the United States is endangered by reason of subversive activity, and I hereby prescribe the following regulations relating to the safeguarding against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, of vessels, harbors, ports, and waterfront facilities in the United States, and all territory and water, continental or insular, subject to the juris-

diction of the United States, exclusive of the Canal Zone, and the said regulations shall constitute Part 6, Subchapter A, Chapter I, Title 33 of the Code of Federal Regulations; and all agencies and authorities of the Government of the United States shall, and all state and local authorities and all persons are urged to, support, conform to, and assist in the enforcement of these regulations and all supplemental regulations issued pursuant thereto:

• • •

[Text of regulations omitted—codified, presently applicable provisions of 33 C.F.R. Part 6 appear below, pp. A-4 to A-10.]

HARRY S. TRUMAN

THE WHITE HOUSE
October 18, 1950

EXECUTIVE ORDER 10277

AMENDING REGULATIONS RELATING TO THE SAFEGUARDING OF VESSELS, HARBORS, PORTS, AND WATERFRONT FACILITIES OF THE UNITED STATES

By virtue of the authority vested in me by Public Law 679, 81st Congress, 2d Session, approved August 9, 1950, which amended section 1, Title II of the act of June 15, 1917, 40 Stat. 220 (50 U.S.C. 191), and as President of the United States, I hereby prescribe the following amendments of the regulations prescribed by Executive Order 10173 of October 18, 1950, which regulations constitute Part 6, Subchapter A, Chapter I, Title 33 of the Code of Federal Regulations:

• • •

[Text of regulations omitted—codified, presently applicable provisions of 33 C.F.R. Part 6 appear below, pp. A-4 to A-10.]

HARRY S. TRUMAN

THE WHITE HOUSE
August 1, 1951

EXECUTIVE ORDER 10352

AMENDMENT OF THE REGULATIONS RELATING TO THE SAFEGUARDING OF VESSELS, HARBORS, PORTS, AND WATERFRONT FACILITIES OF THE UNITED STATES

By virtue of the authority vested in me by the act of August 9, 1950, 64 Stat. 427, which amended section 1, Title II of the act of June 15, 1917, 40 Stat. 220 (50 U.S.C. 191), and as President of the United States, I hereby prescribe the following amendment of the regulations prescribed by Executive Order No. 10173 of October 18, 1950, as amended by Executive Order No. 10277 of August 1, 1951, which regulations constitute Part 6, Subchapter A, Chapter I, Title 33 of the Code of Federal Regulations:

* * *

[Text of regulations omitted—codified, presently provisions of 33 C.F.R. Part 6 appear below, pp. A-4 to A-10.]

HARRY S. TRUMAN

THE WHITE HOUSE
May 19, 1952

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33 C.F.R. PART 6—PROTECTION AND SECURITY OF VESSELS, HARBORS, AND WATERFRONT FACILITIES

Subpart 6.01—Definitions

Sec.

6.01-1 Commandant.
6.01-2 District Commander.
6.01-3 Captain of the Port.
6.01-4 Waterfront facility.
6.01-5 Security zone.

Subpart 6.04—General Provisions

6.04-1 Enforcement.
6.04-5 Preventing access of persons, articles or things to vessels, or waterfront facilities.
6.04-6 Establishing security zones; prohibitions with respect thereto.
6.04-7 Visitation, search, and removal.
6.04-8 Possession and control of vessels.
6.04-11 Assistance of other agencies.

Subpart 6.10—Identification and Exclusion of Persons From Vessels and Waterfront Facilities

6.10-1 Issuance of documents and employment of persons aboard vessels.
6.10-3 Special validation of merchant marine documents.
6.10-5 Access to vessels and waterfront facilities.
6.10-7 Identification credentials.
6.10-9 Appeals.

Subpart 6.12—Supervision and Control of Explosives and Other Dangerous Cargo

6.12-1 General supervision and control.
6.12-3 Approval of facility for dangerous cargo.

Subpart 6.14—Security of Waterfront Facilities and Vessels in Port

6.14-1 Safety measures.
6.14-2 Condition of waterfront facility a danger to vessel.

Subpart 6.16—Sabotage and Subversive Activity

6.16-1 Reporting of sabotage and subversive activity.
6.16-3 Precautions against sabotage.

Subpart 6.18—Penalties

Sec.
6.18-1 Violations.

Subpart 6.19—Responsibility for Security of Vessels and Waterfront Facilities

6.19-1 Primary responsibility.

AUTHORITY: The provisions of this Part 6 issued under 40 Stat. 220, as amended; 50 U.S.C. 191.

SOURCE: The provisions of this Part 6 contained in Executive Order 10173, 15 F.R. 7012, Oct. 20, 1950, unless otherwise noted.

CROSS REFERENCE: For regulations implementing the general enforcement provisions contained in Subparts 6.01—Definitions and 6.04—General Provisions, see Part 124 of this chapter.

Subpart 6.01—Definitions

§6.01-1 Commandant.

"Commandant" as used in this part, means the Commandant of the United States Coast Guard.

§6.01-2 District Commander.

"District Commander" as used in this part, means the officer of the Coast Guard designated by the Commandant to command a Coast Guard District.

§6.01-3 Captain of the Port.

"Captain of the Port" as used in this part, means the officer of the Coast Guard, under the command of a District Commander, so designated by the Commandant for the purpose of giving im-

mediate direction to Coast Guard law enforcement activities within his assigned area. In addition, the District Commander shall be Captain of the Port with respect to remaining areas in his District not assigned to officers designated by the Commandant as Captain of the Port.

[E.O. 11249, 30 F.R. 13001, Oct. 13, 1965]

§6.01-4 Waterfront facility.

"Waterfront facility" as used in this part, means all piers, wharves, docks, and similar structures to which vessels may be secured; areas of land, water, or land and water under and in immediate proximity to them; buildings on such structures or contiguous to them and equipment and materials on such structures or in such buildings.

[E.O. 11249, 30 F.R. 13001, Oct. 13, 1965]

§6.01-5 Security zone.

"Security zone" as used in this part, means all areas of land, water, or land and water, which are so designated by the Captain of the Port for such time as he deems necessary to prevent damage or injury to any vessel or waterfront facility, to safeguard ports, harbors, territories, or waters of the United States or to secure the observance of the rights and obligations of the United States.

[E.O. 11249, 30 F.R. 13001, Oct. 13, 1965]

Subpart 6.04—General Provisions

§6.04-1 Enforcement.

(a) The rules and regulations in this part shall be enforced by the captain of the port under the supervision and general direction of the District Commander and the Commandant, and all authority and power vested in the captain of the port by the regulations in this part shall be deemed vested in and may be exercised by the District Commander and the Commandant.

(b) The rules and regulations in this part may be enforced by any other officer of the Coast Guard designated by the Commandant or the District Commander.

[E.O. 10173, 15 F.R. 7012, Oct. 20, 1950, as amended by E.O. 10277, 16 F.R. 7541, Aug. 2, 1951]

§6.04-5 Preventing access of persons, articles or things to vessels, or waterfront facilities.

The Captain of the Port may prevent any person, article, or thing from boarding or being taken or placed on board any vessel or entering or being taken into or upon or placed in or upon any waterfront facility whenever it appears to him that such action is necessary in order to secure such vessel from damage or injury or to prevent damage or injury to any vessel, or waterfront facility or waters of the United States, or to secure the observance of rights and obligations of the United States.

[E.O. 11249, 30 F.R. 13001, Oct. 13, 1965]

§6.04-6 Establishing security zones; prohibitions with respect thereto.

The Captain of a Port may establish security zones subject to the terms and conditions specified in §6.01-5. No person or vessel shall enter a security zone without the permission of the Captain of the Port. No person shall board or take place any article or thing on board any vessel in a security zone without the permission of the Captain of the Port. No person shall take or place any article or thing upon any waterfront facility in any such zone without such permission.

[E.O. 11249, 30 F.R. 13001, Oct. 13, 1965]

§6.04-7 Visitation, search, and removal.

The Captain of the Port may cause to be inspected and searched at any time any vessel, waterfront facility, or security zone, or any person, article, or thing thereon or therein, within the jurisdiction of the United States, may place guards upon any such vessel, waterfront facility, or security zone and may remove therefrom any and all persons, articles, or things not specifically authorized by him to go or remain thereon or therein.

[E.O. 11249, 30 F.R. 13002, Oct. 13, 1965]

§6.04-8 Possession and control of vessels.

The captain of the port may supervise and control the movement of any vessel and shall take full or partial possession or control of any vessel or any part thereof, within the territorial waters of the United States under his jurisdiction, whenever it appears to him that such action is necessary in order to secure such vessel from damage or injury, or to prevent damage or injury to any vessel or waterfront facility or waters of the United States, or to secure the observance of rights and obligations of the United States.

§6.04-11 Assistance of other agencies.

The captain of the port may enlist the aid and cooperation of Federal, State, county, municipal, and private agencies to assist in the enforcement of regulations issued pursuant to this part.

Subpart 6.10—Identification and Exclusion of Persons From Vessels and Waterfront Facilities

§6.10-1 Issuance of documents and employment of persons aboard vessels.

No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States: *Provided,* That the Commandant may designate categories of merchant vessels to which the foregoing shall not apply.

[E.O. 10352, 17 F.R. 4624, May 21, 1952]

§6.10-3 Special validation of merchant marine documents.

The Commandant may require that all licensed officers and certificated men who are employed on other than the exempted designated categories of merchant vessels of the United States be holders of specially validated documents. The form of such documents, the conditions, and the manner of their issuance shall be as prescribed by the Commandant. The Commandant shall revoke and require the surrender of a specially validated document when he is no longer satisfied that the holder is entitled thereto.

§6.10-5 Access to vessels and waterfront facilities.

Any person on board any vessel or any person seeking access to any vessel or any waterfront facility within the jurisdiction of the United States may be required to carry identification credentials issued by or otherwise satisfactory to the Commandant. The Commandant may define and designate those categories of vessels and areas of the waterfront wherein such credentials are required.

§6.10-7 Identification credentials.

The identification credential to be issued by the Commandant shall be known as the Coast Guard Port Security Card, and the form of such credential, and the conditions and the manner of its issuance shall be as prescribed by the Commandant after consultation with the Secretary of Labor. The Commandant shall not issue a Coast Guard Port Security Card unless he is satisfied that the character and habits of life of the applicant therefor are such as to authorize the belief that the presence of such individual on board a vessel or within a waterfront facility would not be inimical to the security of the United States. The Commandant shall revoke and require the surrender of a Coast Guard Port Security Card when he is no longer satisfied that the holder is entitled thereto. The Commandant may recognize for the same purpose such other credentials as he may designate in lieu of the Coast Guard Port Security Card.

[E.O. 10277, 16 F.R. 7541, Aug. 2, 1951]

§6.10-9 Appeals.

Persons who are refused employment or who are refused the issuance of documents or who are required to surrender such documents, under this subpart, shall have the right of appeal, and the Commandant shall appoint Boards for acting on such appeals. Each such Board shall, so far as practicable, be composed of one Coast Guard officer, one member drawn from management, and one member drawn from labor. The members drawn from management and labor shall, upon suitable security clearance, be nominated by the Secretary of Labor. Such members shall be deemed to be employees of the United States and shall be entitled to compensation under the provisions of section 15 of the act of August 2, 1946 (5 U.S.C. 55a) while performing duties incident to such employment. The Board shall consider each appeal brought before it and, in recommending final action to the Com-

mandant, shall insure the appellant all fairness consistent with the safeguarding of the national security.

Subpart 6.12—Supervision and Control of Explosives or Other Dangerous Cargo

§6.12-1 General supervision and control.

The captain of the port may supervise and control the transportation, handling, loading, discharging, stowage, or storage of explosives, inflammable or combustible liquids in bulk, or other dangerous articles or cargo covered by the regulations entitled "Explosives or Other Dangerous Articles on Board Vessels" (46 C.F.R. Part 146) and the regulations governing tank vessels (46 C.F.R. Parts 30 to 39, inclusive).

§6.12-3 Approval of facility for dangerous cargo.

The Commandant may designate waterfront facilities for the handling and storage of, and for vessel loading and discharging, explosives, inflammable or combustible liquids in bulk, or other dangerous articles or cargo covered by the regulations referred to in §6.12.-1, and may require the owners, operators, masters, and others concerned to secure permits for such handling, storage, loading, and unloading from the captain of the port, conditioned upon the fulfillment of such requirements for the safeguarding of such waterfront facilities and vessels as the Commandant may prescribe.

Subpart 6.14—Security of Waterfront Facilities and Vessels in Port

§6.14-1 Safety measures.

The Commandant, in order to achieve the purposes of this part, may prescribe such conditions and restrictions relating to the safety of waterfront facilities and vessels in port as he finds to be necessary under existing circumstances. Such conditions and restrictions may extend, but shall not be limited to, the inspection, operation, maintenance, guarding, and manning of, and fire-prevention measures for, such vessels and waterfront facilities.

[E.O. 10277, 16 F.R. 7541, Aug. 2, 1951]

§6.14-2 Condition of waterfront facility a danger to vessel.

Whenever the captain of the port finds that the mooring of any vessel to a wharf, dock, pier, or other waterfront structure would endanger such vessel, or any other vessel, or the harbor or any facility therein by reason of conditions existing on or about such wharf, dock, pier, or other waterfront structure, including, but not limited to, inadequate guard service, insufficient lighting, fire hazards, inadequate fire protection, unsafe machinery, internal disturbance, or unsatisfactory operation, the captain of the port may prevent the mooring of any vessel to such wharf, dock, pier, or other waterfront structure until the unsatisfactory condition or conditions so found are corrected, and he may, for the same reasons, after any vessel has been moored, compel the shifting of

such vessel from any such wharf, dock, pier, or other waterfront structure.

[E.O. 10277, 16 F.R. 7541, Aug. 2, 1951]

Subpart 6.16—Sabotage and Subversive Activity

§6.16-1 Reporting of sabotage and subversive activity.

Evidence of sabotage or subversive activity involving or endangering any vessel, harbor, port, or waterfront facility shall be reported immediately to the Federal Bureau of Investigation and to the captain of the port, or to their respective representatives.

§6.16-3 Precautions against sabotage.

The master, owner, agent, or operator of a vessel or waterfront facility shall take all necessary precautions to protect the vessel, waterfront facility, and cargo from sabotage.

Subpart 6.18—Penalties

§6.18-1 Violations.

Section 2, Title II of the act of June 15, 1917, as amended, 50 U.S.C. 192, provides as follows:

If any owner, agent, master, officer, or person in charge, or any member of the crew of any such vessel fails to comply with any regulation or rule issued or order given under the provisions of this title, or obstructs or interferes with the exercise of any power conferred by this title, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and the person guilty of such failure, obstruction, or interference shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $10,000.

(a) If any other person knowingly fails to comply with any regulation or rule issued or order given under the provisions of this title, or knowingly obstructs or interferes with the exercise of any power conferred by this title, he shall be punished by imprisonment for not more than ten years and may, at the discretion of the court, be fined not more than $10,000.

Subpart 6.19—Responsibility for Security of Vessels and Waterfront Facilities

§6.19-1 Primary responsibility.

Nothing contained in this part shall be construed as relieving the masters, owners, operators, and agents of vessels or other waterfront facilities from their primary responsibility for the protection and security of such vessels or waterfront facilities.

[E.O. 10277, 16 F.R. 7541, Aug. 2, 1951]

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33 C.F.R. PART 121—SPECIAL VALIDATION ENDORSEMENT FOR EMERGENCY SERVICE FOR MERCHANT MARINE PERSONNEL

Sec.

121.01 Requirements for special validation endorsement.
121.03 Standards.
121.05 Applications.
121.07 Approval of applicant by Commandant.
121.09 Holders of special validation endorsement.
121.11 Notice by Commandant.
121.13 Hearing Boards.
121.15 Notice by Hearing Board.
121.17 Challenges.
121.19 Hearing procedure.
121.21 Action by Commandant.
121.23 Appeals.
121.25 Action by Commandant after appeal.
121.27 Outstanding endorsements and applications.
121.29 Applications previously denied.

AUTHORITY: The provisions of this Part 121 issued under R.S. 4517, 4518, secs. 2, 19, 23 Stat. 58, 118, sec. 7, 49 Stat. 1936, sec. 2, 40 Stat. 220; 46 U.S.C. 570-572, 2, 689, 50 U.S.C. 191, E.O. 10173, 15 F.R. 7005. 3 C.F.R., 1950 Supp., E.O. 10277, 16 F.R. 7537, 3 C.F.R., 1951 Supp., E.O. 10352, 17 F.R. 4607, 3 C.F.R. 1952 Supp.

SOURCE: The provisions of this Part 121 contained in C.G.F.R. 56-12, 21 F.R. 2814, May 1, 1956, unless otherwise noted.

§121.01 Requirements for special validation endorsement.

(a) Except as otherwise provided in this section no person shall be employed on a merchant vessel of the United States of 100 gross tons or over unless he is in possession of a Merchant Mariner's document bearing a special validation endorsement for emergency service.

(b) The vessels described in paragraph (a) of this section include those at anchor or made fast to a dock, but not those laid up or dismantled or out of commission.

(c) By "employed" and "employment" is meant the engagement of any person to fill any licensed or certificated berth on board ship whether or not under articles and includes those engaged for standby, relief, or other capacities.

(d) The following terms and conditions shall apply with respect to the employment of any person as a replacement or addition in the crew of any vessel described in paragraph (a) of this section at foreign ports when persons in possession of documents bearing a special validation endorsement for emergency service are not available as established to the satisfaction of the United States consular representative of the area:

(1) A person in possession of a United States seaman's document not bearing a special validation endorsement for emergency service may be employed only after approval of the Commandant is obtained by the United States consular representative for the area or by the master of the vessel.

(2) A person who is a United States citizen and who is not in possession of a United States seaman's document may be employed if no person specified in subparagraph (1) of this paragraph is available as established to the satisfaction of the United States consular representative for the area, and then only after approval of the Commandant is obtained by the United States consular representative for the area or by the master of the vessel.

(3) A person who is not a citizen of the United States and who is not in possession of a United States seaman's document may be employed only if no person as specified in subparagraphs (1) and (2) of this paragraph is available as established to the satisfaction of the United States consular representative for the area and then only after the following terms and conditions are met:

(i) No such person shall be employed unless he presents evidence of temporary clearance from the United States consular representative for the area;

(ii) In no case shall the number of such persons employed on any one vessel exceed ten (10) percent of the total complement of the vessel, unless it is established to the satisfaction of the United States consular representative for the area that it is necessary to exceed this percentage to avoid delay to the sailing of the vessel or that the employment of persons with special qualifications as additional crew members is necessary in the vessel's operations; and

(iii) No such person shall be employed to fill the berth of a licensed officer or registered staff officer, except that if no radio officer is available as established to the satisfaction of the United States consular representative for the area, a person may be employed as radio operator in accordance with the provisions of Article 24, section 2, of the International Telecommunications Convention (Atlantic City, 1947), which reads as follows:

2. (1) In the case of complete unavailability of the operator in the course of a sea passage, a flight or a journey, the master or the person responsible for the station may authorize, solely as a temporary measure, an operator holding a certificate issued by the government of another country member of the Union [Footnote: The term "Union" means those countries which are parties to the International Telecommunications Convention] to perform the radio communication service.

(2) When it is necessary to employ as a temporary operator a person without a certificate or an operator not holding an adequate certificate, his performance as such must be limited solely to

signals of distress, urgency and safety, messages relating thereto, messages relating directly to the safety of life, urgent messages relating to movement of the ship and essential messages relating to the navigation and safe movement of the aircraft. Persons employed in these cases are bound by the provisions of 508 regarding the secrecy of correspondence.

(3) In all cases, such temporary operators must be replaced as soon as possible by operators holding the certificate prescribed in Sec. 1 of this article.

§121.03 Standards.

Information concerning an applicant for special validation endorsement for emergency service, or a holder of such endorsement, which may preclude a determination that his character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, shall relate to the following:

(a) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means.

(b) Commission of, or attempts or preparations to commit, an act of espionage, sabotage, sedition or treason, or conspiring with, or aiding or abetting another to commit such an act.

(c) Performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the United States.

(d) Deliberate unauthorized disclosure of classified defense information.

(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended.

§121.05 Applications.

(a) Any person legally holding a current valid license or certificate, or an applicant for such a document, may make application at any Coast Guard Marine Inspection Office for a special validation endorsement for emergency service.

(b) Each Marine Inspection Office shall forward promptly to the Commandant each application for a special validation endorsement received by it.

(c) (1) Application for special validation endorsement shall be made under oath in writing and shall include applicant's answers in full to inquiries with respect to such matters as are deemed by the Commandant to be pertinent to the standards set forth in §121.03, and to be necessary for a determination whether the character and habits of life of the applicant are such as to warrant

the belief that his presence on board vessels of the United States would not be inimical to the security of the United States.

(2) If an applicant fails or refuses to furnish the required information or fails or refuses to make full and complete answer with respect to all matters of inquiry, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes the required information and fully and completely answers all inquiries directed to him.

(d) (1) If, in the judgment of the Commandant, an application does not contain sufficient information to enable him to satisfy himself that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant may require the applicant to furnish, under oath in writing or orally, such further information as he deems pertinent to the standards set forth in §121.03 and necessary to enable him to make such a determination.

(2) If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

(e) Upon receipt, the application and such further information as the Commandant may have required shall be referred, except in those instances where action on an application is held in abeyance pursuant to paragraphs (c)(2) or (d)(2) of this section, to a committee composed of a representative of the Legal Division, of the Merchant Vessel Personnel Division, and of the Intelligence Division, Coast Guard Headquarters. The committee shall prepare an analysis of the available information and shall make recommendations for action by the Commandant.
[CGFR 59–63, 25 F.R. 1588, Feb. 24, 1960]

§121.07 Approval of applicant by Commandant.

(a) If the Commandant is satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will direct that a special validation endorsement be entered on the applicant's Merchant Mariner's Document.

(b) If the Commandant is not satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will notify the applicant in writing as provided for in §121.11.

§121.09 Holders of special validation endorsement.

(a) Whenever the Commandant is not satisfied that the character

and habits of life of a holder of a document bearing a special validation endorsement are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will request the holder to furnish under oath in writing such information as he deems pertinent to the standards set forth in §121.03 and necessary for a determination on this issue.

(b) If the holder fails or refuses to furnish such information within thirty (30) days after receipt of the Commandant's request, the Commandant may issue the written notice provided for in §121.11(a).

(c) The holder's failure or refusal to furnish such information shall preclude a determination that the holder's character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States.

(d) Upon receipt of such information as the Commandant may have required, the procedure prescribed in §121.05(e) shall be followed.

(e) If the Commandant is satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall notify the holder accordingly.

(f) If the Commandant is not satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall notify the holder in writing as provided for in §121.11.

[CGFR 59–63, 25 F.R. 1589, Feb. 24, 1960]

§121.11 Notice by Commandant.

(a) The notice provided for in §§121.07 and 121.09 shall contain a statement of the reasons why the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States. Such notice shall be as specific and detailed as the interests of national security shall permit and shall include pertinent information such as names, dates, and places in such detail as to permit reasonable answer.

(b) The applicant or holder shall have 20 days from the date of receipt of the notice of reasons to file written answer thereto. Such answer may include statements or affidavits by third parties or such other documents or evidence as the applicant or holder deems pertinent to the matters in question.

(c) Upon receipt of such answer the procedure prescribed in §121.05(e) shall be followed.

(d) If the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document or, in the case of a holder, notify him accordingly.

(e) If the Commandant is not satisfied that the applicant's or holder's character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall refer the matter to a Hearing Board for hearing and recommendation in accordance with the provisions of this part.

§121.13 Hearing Boards.

The Commandant may establish a Hearing Board in each Coast Guard District. The Commandant shall designate for each Hearing Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a second member from a panel of persons representing labor named by the Secretary of Labor, and a third member from a panel of persons representing management named by the Secretary of Labor.

§121.15 Notice by Hearing Board.

Whenever the Commandant refers a matter to a Hearing Board, the Chairman shall:

(a) Fix the time and place of the hearing;

(b) Inform the applicant or holder of the names of the members of the Hearing Board, their occupations, and the businesses or organizations with which they are affiliated, of his privilege of challenge, and of the time and place of the hearing.

(c) Inform the applicant or holder of his privilege to appear before the Hearing Board in person or by counsel or representative of his choice, and to present testimonial and documentary evidence in his behalf, and to cross-examine any witnesses appearing before the Board; and

(d) Inform the applicant or holder that if within 10 days after receipt of the notice he does not request an opportunity to appear before the Hearing Board, either in person or by counsel or representative, the Hearing Board will proceed without further notice to him.

§121.17 Challenges.

Within five days after receipt of the notice described in §121.15 the applicant or holder may request disqualification of any member

of the Hearing Board on the grounds of personal bias or other cause. The request shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. The affidavit may be supplemented by an oral presentation if desired. If after due consideration the Chairman believes a challenged member is qualified notwithstanding the challenge, he shall notify the person who made the challenge and arrange to proceed with the hearing. If the person who made the challenge takes exception to the ruling of the Chairman, the exception and data relating to the claim of disqualification shall be made a matter of record. If the Chairman finds that there is reasonable ground for disqualification he shall furnish the person who made the challenge with the name of an alternate in lieu of the challenged member and arrange to proceed with the hearing. In the event the Chairman is challenged, he shall forthwith notify the Commandant, furnishing the grounds for the claim of disqualification, and the Commandant shall act upon the challenge in accordance with the foregoing procedure. In addition to the right of challenge for cause, a person who has requested a hearing shall have two peremptory challenges, one challenge for the management member and one challenge for the labor member of the Hearing Board. Should the management member be so challenged, the person who made the challenge may elect to have the management member replaced by another management member or by a member not representing either management or labor; if the member peremptorily challenged represents labor, the person who made the challenge may elect to have the labor member replaced by another labor member or by a member not representing either management or labor.

§121.19 Hearing procedure.

(a) Hearing shall be conducted in an orderly manner and in a serious, business-like atmosphere of dignity and decorum and shall be expedited as much as possible.

(b) The hearing shall be in open or closed session at the option of the applicant or holder.

(c) Testimony before the Hearing Board shall be given under oath or affirmation.

(d) The Chairman of the Hearing Board shall inform the applicant or holder of his right to:

(1) Participate in the hearing;

(2) Be represented by counsel of his choice;

(3) Present witnesses and offer other evidence in his own behalf and in refutation of the reasons set forth in the Notice of the Commandant; and

(4) Cross-examine any witnesses offered in support of such reasons.

(e) Hearings shall be opened by the reading of the Notice of the

Commandant and the answer thereto. Any statement and affidavits filed by the applicant or holder may be incorporated in the record by reference.

(f) The Hearing Board may, in its discretion, invite any person to appear at the hearing and testify. However, the Board shall not be bound by the testimony of such witness by reason of having called him and shall have full right to cross-examine the witness. Every effort should be made to produce material witnesses to testify in support of the reasons set forth in the Notice of the Commandant, in order that such witnesses may be confronted and cross-examined by the applicant or holder.

(g) The applicant or holder may introduce such evidence as may be relevant and pertinent. Rules of evidence shall not be binding on the Hearing Board, but reasonable restrictions may be imposed as to the relevancy, competency and materiality of matters considered. If the applicant or holder is, or may be, handicapped by the non-disclosure to him of confidential sources, or by the failure of witnesses to appear, the Hearing Board shall take the fact into consideration.

(h) The applicant or holder or his counsel or representative shall have the right to control the sequence of witnesses called by him.

(i) The Hearing Board shall give due consideration to documentary evidence developed by investigation, including membership cards, petitions bearing the applicant's or holder's signature, books, treatises or articles written by the applicant or holder and testimony by the applicant or holder before duly constituted authority.

(j) Complete verbatim stenographic transcription shall be made of the hearing by qualified reporters and the transcript shall constitute a permanent part of the record. Upon request, the applicant or holder or his counsel or representative shall be furnished, without cost, a copy of the transcript of the hearing.

(k) The Board shall reach its conclusion and base its determination on information presented at the hearing, together with such other information as may have been developed through investigations and inquiries or made available by the applicant or holder.

(l) If the applicant or holder fails, without good cause shown to the satisfaction of the chairman, to appear personally or to be represented before the Hearing Board, the Board shall proceed with consideration of the matter.

(m) The recommendation of the Hearing Board shall be in writing and shall be signed by all members of the Board. The Board shall forward to the Commandant, with its recommendation, a memorandum of reasons in support thereof. Should any member be in disagreement with the majority a dissent should be noted setting forth the reasons therefor. The recommendation of the Board, together with the complete record of the case, shall be sent to the Commandant as expeditiously as possible.

§121.21 Action by Commandant.

(a) If, upon receipt of the Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Board's recommendation, the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall:

(1) In the case of an applicant for special validation endorsement, notify him of the Commandant's refusal to enter such endorsement;

(2) In the case of an applicant for a Merchant Mariner's Document, notify him of the Commandant's refusal to issue such document; or

(3) In the case of a holder, revoke and require the surrender of his special validation endorsement.

(c) Such applicant or holder shall be notified of his right, and shall have 20 days from the receipt of such notice within which, to appeal under this part.

§121.23 Appeals.

(a) The Commandant shall establish at Coast Guard Headquarters, Washington, D.C., an Appeal Board to hear appeals provided for in this part. The Commandant shall designate for the Appeal Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a member from a panel of persons representing management nominated by the Secretary of Labor, and a member from a panel of persons representing labor nominated by the Secretary of Labor. The Commandant shall insure that persons designated as Appeal Board members have suitable security clearance. The Chairman of the Appeal Board shall make all arrangements incident to the business of the Appeal Board.

(b) If an applicant or holder appeals to the Appeal Board within 20 days after receipt of notice of his right to appeal under this part, his appeal shall be handled under the same procedure as that specified in §121.15 and the privilege of challenge may be exercised through the same procedure as that specified in §121.17.

(c) Appeal Board proceedings shall be conducted in the same manner as that specified in §121.19.

§121.25 Action by Commandant after appeal.

(a) If, upon receipt of the Appeal Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Appeal Board's recommendation, the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall notify the applicant or holder that his appeal is denied.

§121.27 Outstanding endorsements and applications.

(a) All special validation endorsements for emergency service entered upon Merchant Mariner's Documents will be accepted as valid until cancelled, revoked, or suspended by proper authority.

(b) A person who has filed an application for a Merchant Mariner's Document bearing a special validation endorsement for emergency service and who has not received such an endorsement prior to May 1, 1956, shall submit a new application in accordance with the requirements of this part.

§121.29 Applications previously denied.

A person who has been denied a Merchant Mariner's Document bearing a special validation endorsement for emergency service, before May 1, 1956, may file a new application for such an endorsement in accordance with the requirements of this part.

U.S. CONSTITUTION

Article I, Section 9, Clause 3

No Bill of Attainder or ex post facto law shall be passed.

Amendment I

Congress shall make no law *** abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person *** shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ***.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right ••• to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute, executive orders and regulations involved	3
Questions presented	2
Statement	3
Summary of argument	7
Argument	11
I. The screening program for merchant seamen has been validly authorized by Congress	12
A. The Magnuson Act authorizes the screening procedures	14
B. The Magnuson Act does not unconstitutionally delegate legislative power to the President	16
II. The screening program for merchant seamen does not infringe constitutional rights	18
A. The Commandant's interrogatories did not invade First Amendment rights	18
B. Appellant's attacks on the procedures for processing applications for special validation are premature	25
C. The regulatory scheme is not unconstitutionally vague	29
D. The regulations establishing the screening program do not constitute a bill of attainder or *ex post facto* law	30
Conclusion	32
Cases:	
Aircraft and Diesel Corp. v. *Hirsch*, 331 U.S. 752	27
American Communications Assn. v. *Douds*, 339 U.S. 412	21, 24
Aptheker v. *Secretary of State*, 378 U.S. 500	29, 30
Barenblatt v. *United States*, 360 U.S. 109	19, 21
Blumenthal v. *Federal Communications Commission*, 318 F. 2d 276	19, 22, 24

284-164—67——1

Cases—Continued

	Page
Borrow v. *Federal Communications Commission*, 285 F. 2d 666	22, 24
Bowles v. *Willingham*, 321 U.S. 503	8, 17
Briehl v. *Dulles*, 248 F. 2d 561, reversed on other grounds *sub nom. Kent* v. *Dulles*, 357 U.S. 116	23
Chicago & Southern Air Lines v. *Waterman Steamship Corp.*, 333 U.S. 103	18
Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1	31
Cronan v. *Federal Communications Commission*, 285 F. 2d 288, certiorari denied, 366 U.S. 904	22, 24
Dent v. *West Virginia*, 129 U.S. 114	31
Elfbrandt v. *Russell*, 384 U.S. 11	29
Fahey v. *Malonee*, 332 U.S. 245	17
Garner v. *Board of Public Works of Los Angeles*, 341 U.S. 716	21, 24
Gerende v. *Board of Supervisors*, 341 U.S. 56	21, 24
Graham v. *Richmond*, 272 F. 2d 517	28
Hawker v. *New York*, 170 U.S. 189	31
Hirabayshi v. *United States*, 320 U.S. 81	17
Homer v. *Richmond*, 292 F. 2d 719	22
Hume v. *Moore, McCormack Lines*, 121 F. 2d 336	20
In re Anastaplo, 366 U.S. 82	21, 24
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123	22, 23
Keyishian v. *Board of Regents*, 385 U.S. 589	30
Konigsberg v. *State Bar*, 366 U.S. 36	19, 21, 24
Lerner v. *Casey*, 357 U.S. 468	21, 27
Lichter v. *United States*, 334 U.S. 742	17
McBride v. *Roland*, 248 F. Supp. 459, affirmed, 369 F. 2d 65, certiorari denied *sub nom. McBride* v. *Smith*, 387 U.S. 932	16, 23, 29
Noto v. *United States*, 367 U.S. 290	29
Ogden v. *United States*, 303 F. 2d 724	22
Parker v. *Lester*, 227 F. 2d 708	16, 27
Scales v. *United States*, 367 U.S. 203	29
Speiser v. *Randall*, 357 U.S. 513	24
United States v. *Brown*, 381 U.S. 437	10, 31
United States v. *Curtiss-Wright Corp.*, 299 U.S. 304	18

Cases—Continued Page

United States v. *Gray*, 207 F. 2d 237 16
United States v. *Rock Royal Cooperative*, 307 U.S. 533 .. 17
United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537 17
Yakus v. *United States*, 321 U.S. 414 17
Zemel v. *Rusk*, 381 U.S. 1 ..... 2, 18

Constitution and statutes:
United States Constitution:
First amendment 2, 8, 9, 10, 18, 19, 23
Fifth amendment 19
Act of June 17, 1917, Title II, 40 Stat. 220 14
Magnuson Act, 64 Stat. 427 (1950), 50 U.S.C. 191, 192, 194 ..... 2, 3, 4, 7, 8, 12, 13, 14, 15, 16, 17

Executive Orders and Regulations:
Executive Order 9074, 7 Fed. Reg. 1587 14
Executive Order 10173, 15 Fed. Reg. 7005 ..... 12, 26
Executive Order 10352, 17 Fed. Reg. 4624 12
Executive Order 10450, 18 Fed. Reg. 2489 ..... 4, 22
33 C.F.R. 6.10–1 13
33 C.F.R. 6.10–3 13
33 C.F.R. 6.10–7 26
33 C.F.R. 121.05 ..... 7, 13, 28
33 C.F.R. 121.11 26
33 C.F.R. 121.17 26
Civil Aeronautics Board Regulations, 14 C.F.R. 201.4 (c)(8) 24
Federal Power Commission Regulations, 18 C.F.R. 4.31 24

Miscellaneous:
96 Cong. Rec.:
10794 ..... 8, 15
10795 15
11220 15
11321 15
Brown and Fassett, *Security Tests for Maritime Workers: Due Process under the Port Security Program*, 62 Yale L.J. 1163 (1953) 15, 21, 26
Gilmore and Black, *The Law of Admiralty* (1957) 20
S. Rep. No. 2118, 81st Cong., 2d Sess. 14

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 196

HERBERT SCHNEIDER, APPELLANT

v.

WILLARD SMITH, COMMANDANT, UNITED STATES COAST GUARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the district court (J.A. 36–44) is reported at 263 F. Supp. 496.

JURISDICTION

This is a direct appeal from the final judgment of a three-judge district court, convened pursuant to 28 U.S.C. 2282. The judgment was entered on January 23, 1967 (J.A. 43), and the notice of appeal was filed on March 17, 1967. Pursuant to an extension of time granted by the district court, the Jurisdictional Statement was filed on May 26, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

On October 9, 1967, the Court entered an order postponing "[f]urther consideration of the question of probable jurisdiction in this case * * * to the hearing of the case on the merits." We agree with appellant that the case was one required to be heard by a statutory court of three judges and, accordingly, that this Court has jurisdiction of the appeal. It appears that appellant did raise in the district court the question whether the Magnuson Act unconstitutionally delegates legislative power to the executive (App. Br. 18, n. 4). While we believe that delegation did not overreach constitutional boundaries, we recognize that the question is sufficiently substantial to warrant convening a special court under 28 U.S.C. 2282. *Zemel* v. *Rusk*, 381 U.S. 1, 6.[1]

STATUTE, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The Magnuson Act, 64 Stat. 427 (1950), 50 U.S.C. 191, 192 and 194, and the Executive Orders and Regulations issued pursuant thereto are set forth in the appendix to appellant's brief at pages A1–A20.

QUESTIONS PRESENTED

1. Whether the Magnuson Act authorizes the establishment of a screening program for merchant seamen.

2. Whether the Magnuson Act unconstitutionally delegates legislative power to the executive.

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[1] Accordingly, there is no more occasion here than in *Zemel* to decide whether a constitutional attack on regulations issued pursuant to a statutory grant of authority can be deemed an attack on the statute for the purposes of 28 U.S.C. 2282. See 381 U.S. at 6.

3. Whether the First Amendment precludes the Commandant of the Coast Guard from questioning an applicant for a special validation about his past association with the Communist Party or other subversive organizations.

4. Whether appellant may challenge the procedures prescribed for the processing of his application without exhausting his administrative remedies, when the regulations on their face provide procedures that can satisfy the demands of due process.

5. Whether the criteria outlined in the regulations for determining when a special validation should be denied are unconstitutionally vague.

6. Whether the fact that the Commandant may consider past membership in the Communist Party or other subversive organization in determining whether or not a special validation should be issued renders the screening program unconstitutional as a bill of attainder or *ex post facto* law.

STATEMENT

Appellant is the holder of a validly issued merchant marine document No. Z–202156, which evidences his ability to act as a Second Assistant Engineer on steam vessels (J.A. 11).[2] During the period from 1942 to 1949 he served aboard American-flag commercial vessels in various capacities, including wiper, oiler, fireman and fourth, third and second assistant engineer. Since 1949 appellant has been

[2] The document which appellant presently holds is one of a series of such documents which have been issued to appellant since 1943 (J.A. 2–3).

employed in trades other than that of a merchant seaman (J.A. 10).

On October 19, 1964, appellant applied to the Commandant of the Coast Guard for a special validation endorsement on his merchant mariner's document. Under executive orders and regulations promulgated pursuant to the Magnuson Act, 50 U.S.C. 191, such a special validation is necessary to permit an individual to serve aboard merchant vessels of the United States of 100 or more gross tons (J.A. 11). As part of his application, appellant filled out and submitted a "Seaman's Certificate Application" and a "Specially Validated Merchant Mariner's Document Application Questionnaire" (J.A. 25–33).

The questionnaire submitted by appellant contained the following questions and answers relating to his membership and participation in organizations designated by the Attorney General pursuant to Executive Order 10450, 18 F. R. 2489 (J.A. 12):

> ITEM 5. Have you ever submitted material for publication to any of the organizations listed in Item 6 below?
> Answer. No.
> ITEM 6. Are you now, or have you ever been, a member of, or affiliated or associated with in any way, any of the organizations set forth below?
> Answer. Yes.
> If your answer is "Yes", give full details in Item 7.
> ITEM 7. Use this space to explain Items 1 through 6. Show item numbers to which an-

swers apply. Attach a separate sheet if there is not enough space here.

Answer. I have been a member of many political and social organizations, including several named on this list. I cannot remember the names of most of them and could not be specific about any. To the best of my knowledge, I have not been a member of or participated in the activities of these organizations for ten years.

By letter dated March 25, 1965, the Commandant advised appellant that the answers to the questionnaire did not provide sufficient information for him to determine whether appellant's document should be specially validated and requested appellant to respond under oath to certain interrogatories, set out below,[3] relating generally to the extent and meaningfulness of appellant's membership in any of the designated organizations (J.A. 34).

[3] The interrogatories (Exh. A–3, J.A. 34–36) refer to appellant's earlier affirmative answer to the question whether he had been a member of organizations designated by the Attorney General, and to his statement quoted in the text above; he is then asked:

1. With respect to your statements above, furnish the following information, fully and honestly to the best of your ability:

(a) List the names of the political and social organizations to which you belonged, and location.

(b) Furnish approximate dates of membership.

(c) Furnish full particulars concerning the extent of your activities and participation in the organizations (number and type of meetings/functions attended; positions or offices held; classes or schools attended; contributions made; etc.)

(d) Your reason for discontinuing the membership.

284-164—67——2

In response to this request for additional information, the Commandant received a letter from appellant's counsel in which it was admitted that appellant had been a member of the Community Party, as well as other organizations on the Attorney General's list, and had subscribed to "The People's World." However, the letter stated that appellant would not answer the propounded questions because "it would be obnoxious to a truly free citizen to answer the kinds of questions under compulsion that you require" (Exh. 5, J.A. 21–23).

As appellant had been advised in the Commandant's letter of March 25, 1965 (Exh. A–3, J.A. 34), no further action was taken on his application because of his failure to provide the additional informa-

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(e) Your present attitude toward the principles and objectives of the organizations.

If your answer is "YES" to the following Questions, *explain* fully in the space provided at the end of the Interrogatories:

2. Are you now, or have you ever been, a member of or affiliated with, in any way, the Communist Party, its Subdivisions, Subsidiaries, or Affiliates? (Answer "Yes" or "No")

3. Have you at any time been a subscriber to the "People's World"? (Answer "Yes" or "No") If your answer is "YES," give dates.

4. Have you at any time engaged in any activities in behalf of the "People's World"? (Answer "Yes" or "No") If your answer is "YES", furnish details.

5. What is your present attitude toward the Communist Party?

6. What is your present attitude toward the principles and objectives of Communism?

7. What is your attitude toward the form of Government of the United States?

tion requested. In declining to process the application further, the Commandant was acting in accordance with Section 121.05(d)(2) of Title 33 Code of Federal Regulations—a copy of which had been enclosed in the letter of March 25, 1965 to appellant—which provides:

> If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

In November, 1965, appellant instituted this action seeking a declaration that the Magnuson Act, the executive orders and regulations issued pursuant thereto and the Commandant's actions thereunder are unconstitutional and praying that the Commandant be directed to approve appellant's application for a special validation endorsement.[4] A three-judge district court was convened and, acting on the basis of admitted facts (J.A. 10–36), the court dismissed the complaint (J.A. 36–44).

SUMMARY OF ARGUMENT

I

We believe that the legislative history and language of the Magnuson Act manifest the intent of Congress to authorize the type of screening program that has been established. Adopted in 1950 during the Korean crisis, the Magnuson Act was an amendment to existing legislation under which personnel screening programs

[4] Appellant also sought a judgment for $10,000.

had been established during World War II, and, according to its sponsor, the new legislation would "give the President the authority to invoke the same kind of security measures which were invoked in World War I and in World War II." The Act expressly empowers the President to take full possession of a vessel and to remove therefrom all "persons not authorized by him to go or remain on board." This necessarily includes authority to establish a screening program.

Nor can it be said that the manner in which Congress granted this power to the President involved an unconstitutional delegation of legislative power to the executive. The Act specifically provides that, when the President determines that the security of the United States is endangered, he shall adopt rules and regulations designed to protect vessels and waterfront facilities from acts of sabotage and subversion and grants him the power to exclude unauthorized persons from any vessel. Thus, here, as in *United States* v. *Robel,* No. 8, October Term, 1967, reargued on October 9, 1967, we contend that the Act meets the standards of a constitutional delegation of authority because it clearly describes "what job must be done, who must do it, and what is the scope of his authority." *Bowles* v. *Willingham,* 321 U.S. 503, 515.

II

The screening program that has been established pursuant to the authority granted to the President by the Magnuson Act does not unconstitutionally infringe on First Amendment rights. The vital interest of the

government in protecting the nation's shipping from sabotage and subversion clearly justifies the inquiries into associational activities which the screening program involves. Questions concerning a person's association with the Communist Party and other subversive organizations have been held proper in many situations where the governmental interest to be protected was not so obvious as it is here. If, as we contend, the First Amendment gives no right to refuse to answer the interrogatories involved here, then, of course, the Commandant was justified in holding appellant's application in abeyance until such time as the questions are answered.

Appellant's other attacks on the procedures which have been established for processing an application for a special validation are prematurely presented. The regulations provide that if appellant supplies the requested information and the application is denied, he will be entitled to a notice from the Commandant setting forth the reasons for the denial and will be given a hearing at which "[e]very effort should be made to produce material witnesses to testify in support of the reasons set forth in the Notice of the Commandant, in order that such witnesses may be confronted and cross-examined * * *." Since the regulations establish procedures that can meet the requirements of due process, appellant should be required to exhaust those procedures before complaining. The question which he now raises concerning the burden of proof and his right to confront witnesses may well prove to be of no consequence once a hearing is held.

Similarly, appellant's claim that the regulations are invalid because they permit the Commandant to take into consideration his membership in the Communist Party and other subversive organizations, without a showing that he had a specific intent to further the illegal purposes of such organizations, should await consideration until after the Commandant has passed upon the application. In light of the fact that appellant has admitted membership in the Communist Party, the Commandant's request for additional information indicates that he does not view past membership in the Party alone as sufficient reason to deny the application. It is evident, therefore, that this issue will not be presented in a meaningful context until all the facts are developed and the Commandant has ruled on the application.

Nor are the standards established for the granting of a special validation unconstitutionally vague. The screening program involved here is not designed to regulate the exercise of First Amendment rights but, rather, to protect shipping from sabotage. The criteria that are established are not absolute bars to the granting of an application but merely serve as factors to be considered in making a determination whether a special validation should be issued.

Finally, we submit that there is no merit to appellant's contention that in allowing the Commandant to take into consideration an applicant's past membership in the Communist Party, the regulations constitute a bill of attainder and an *ex post facto* law. The reg-

ulations provide that the Commandant shall make a determination of the applicant's present character; they do not make any past action of an applicant an absolute bar to the granting of his application. While an examination of an applicant's past conduct may lead to the conclusion that he is not presently qualified for a special validation, he is not being punished for his past actions. Thus, this case is clearly distinguishable from *United States* v. *Brown*, 381 U.S. 437, where the statute at issue made membership in the Communist Party at any time during a prior five-year period an absolute bar to service as a union executive.

ARGUMENT

Appellant failed to obtain a "special validation endorsement" on his Merchant Mariner's document because he refused to furnish certain information required by the Coast Guard relating to his admitted membership in the Communist Party and other organizations which appear on the so-called "Attorney General's List." Although he completed the application form prescribed for those who seek the necessary endorsement, answering all questions and freely admitting past membership in "several" of the listed organizations, he declined to answer further when asked to name the particular organizations to which he had belonged (except for the Communist Party), to state the periods involved and to describe the extent of his membership. Nor did appellant refuse to cooperate on the ground that the information required would tend to incriminate him; rather, he stood on the proposition that the questions were "obnoxious" and,

in effect, that the answers were "none of the government's business." As a result—as the appellant was expressly advised, and as the relevant regulation (33 C.F.R. 121.05(d)(2), App. Br. A14) prescribes—the application for special validation endorsement remains "in abeyance." However, the appellant has not been found to be "subversive" or otherwise unqualified. Indeed, upon furnishing the required information, he may yet obtain a ruling on his application and the result is not foreordained since past membership in a listed organization, even the Communist Party, is not automatically disqualifying.

In this posture of the case, the appellant cannot complain that the required procedures for obtaining the endorsement were improperly or unfairly applied to him. The challenge must be to the Magnuson Act screening program on its face. Accordingly, appellant broadly asserts that these procedures have not been validly authorized by Congress, and that, if properly authorized, then the entire program is unconstitutional for a variety of reasons. We consider each of these claims in turn.

I

THE SCREENING PROGRAM FOR MERCHANT SEAMEN HAS BEEN VALIDLY AUTHORIZED BY CONGRESS

It is not disputed that the regulations promulgated by the Commandant of the Coast Guard—including the provision directly involved here—are fully authorized by Presidential orders issued under the Magnuson Act. Indeed, the relevant Executive Orders (Nos. 10173 and 10352) expressly empower the Commandant

to require "specially validated documents" as a condition of employment on merchant vessels (33 C.F.R. 6.10–3, App. Br. A8), exempting certain categories of vessels if he thinks proper (33 C.F.R. 6.10–1, App. Br. A7), and direct him to deny such a document to any person whose "'character and habits of life" fail to satisfy the Commandant that his presence on board "would not be inimical to the security of the United States" (*ibid.*). While the Presidential orders do not specify how the Commandant is to "satisfy" himself concerning the fitness of a merchant seaman, his regulations providing for completion of an application form (33 C.F.R. 121.05(a), (b), (c), App. Br. A13–A14), and submission of additional information on request (33 C.F.R. 121.05(d), App. Br. A14), are plainly reasonable requirements implementing the Commandant's duty to prescribe "the conditions and the manner" of granting specially validated documents (33 C.F.R. 6.10–3, App. Br. A8). And, of course, it was proper to provide for enforcement of those requirements by withholding action on an application for special validation until the required information is supplied (33 C.F.R. 121.05(c)(2), (d)(2), App. Br. A14).

The claim, then, is not that the Commandant of the Coast Guard acted without authority, but that the President did. There are two arguments: first, that the Magnuson Act does not purport to empower the executive to establish the kind of screening procedure actually put into effect, and, second, that if the Act must be read to give such authorization, it is not a

valid delegation because insufficient guidelines are provided.

A. THE MAGNUSON ACT AUTHORIZES THE SCREENING PROCEDURES

The Magnuson Act, 64 Stat. 427, 50 U.S.C. 191, 192, 194, was enacted in 1950 during the Korean crisis. According to the Senate Committee report on the legislation (S. Rep. No. 2118, 81st Cong., 2d Sess.), Congress sought to give

> the President the power to safeguard against destruction, loss, or injury from sabotage or other subversive acts to vessel, harbors, ports, and other water-front facilities * * * [authorizing him] to employ such departments, agencies, offices, or instrumentalities of the United States as he may deem necessary to carry out the purpose of this measure, to give utmost protection to shipping facilities.

The Act was an amendment to existing legislation[5] under which sweeping security measures, including personnel screening programs, had been adopted during World War II. See Executive Order No. 9074, 7 Fed. Reg. 1587 (1942); Directives of the Commandant of the Coast Guard (April 15 and July 20, 1942). The procedures adopted during World War II authorized the removal of an individual from a vessel or waterfront facility upon a finding that the individual was a saboteur, spy, subversive, unsuitable criminal, drunkard, mental defective or one "whose presence on

[5] Act of June 17, 1917, Title II, 40 Stat. 220. The first two paragraphs of the present Section 191 of Title 50 U.S.C. were contained in the original Act.

board a vessel or on a waterfront facility would * * * constitute a menace to the national security or to the safety of life or property." See Brown and Fassett, *Security Tests for Maritime Workers: Due Process Under the Port Security Program,* 62 Yale L. J. 1163, 1188, n. 127 (1953).

At the time the 1950 Act was introduced in the Senate, Senator Magnuson referred to the need "to invoke security measures on the waterfront" and noted that "[u]nder the provisions of this bill, the President could, and probably would, call on the Coast Guard, the FBI or such other Government agencies as he might wish to use, to give us such waterfront security." 96 Cong. Rec. 10794, 81st Cong., 2d Sess.; see, also, *id.* at 11220, 11321. In addition, he expressly stated that the "measure will give the President the authority to invoke the same kind of security measures which were invoked in World War I and in World War II." 96 Cong. Rec. 10795. Thus, the legislative history manifests the intent of Congress to authorize the President to institute the type of screening programs involved here.

Nor did Congress fail to translate its purpose into the positive text of the statute. The language of the Act itself confers upon the President authority to screen persons who were to be employed upon merchant vessels or, if necessary, to take even more extreme action. Thus, the Act (50 U.S.C. 191, App. Br. A1–A2) provides that if the President finds it necessary in order to protect any vessel or harbor from damage or injury he "may take * * * full possession of such vessels and remove therefrom the

officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof." The grant of power to the President to exclude from vessels all "persons not especially authorized by him to go or remain on board" clearly implies authority to establish a screening procedure for determining who shall be allowed on board.

We conclude that the court below, in accord with the Second and Ninth Circuits, was clearly correct in holding that the Magnuson Act authorizes the screening program challenged here. See *McBride* v. *Roland,* 369 F. 2d 65, 69 (C.A. 2), certiorari denied *sub nom. McBride* v. *Smith,* 387 U.S. 932; *Parker* v. *Lester,* 227 F. 2d 708, 715 (C.A. 9); *United States* v. *Gray,* 207 F. 2d 237, 241 (C.A. 9).

B. THE MAGNUSON ACT DOES NOT UNCONSTITUTIONALLY DELEGATE LEGISLATIVE POWER TO THE PRESIDENT

Appellant alternatively contends that if Congress has authorized the screening program at issue there has been an unconstitutional delegation of legislative authority. The question of the constitutional limitations on the authority of Congress to delegate power to the executive is presently before this Court in *United States* v. *Robel,* No. 8, October Term, 1967, in which reargument directed to this specific issue was had on October 9, 1967, Accordingly, we treat the matter only briefly here.

As we noted in our brief on reargument in that case, this Court has consistently held that there is no unlawful delegation where the act which confers

power on the executive sets forth, as far as reasonably practicable, the legislative purpose and an intelligible principle to govern its implementation. *Lichter* v. *United States,* 334 U.S. 742; *Yakus* v. *United States,* 321 U.S. 414; *Hirabayashi* v. *United States,* 320 U.S. 81; *United States* v. *Rock Royal Cooperative,* 307 U.S. 533; *Fahey* v. *Malonee,* 322 U.S. 245; *United States ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 537. Applying this standard to the present case, we believe it is plain the Magnuson Act does not involve an unconstitutional delegation of congressional power.

The statute on its face gives clear expression to the legislative purpose of Congress "to secure * * * vessels from damage or injury, or to prevent damage or injury to any harbor" and "to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, [to] vessels, harbors, ports, and waterfront facilities * * *." In addition, the statute provides that this objective is to be accomplished by the President through the adoption of rules and regulations which may, if necessary, authorize the taking of "full possession and control of such vessels and [the removal] therefrom [of] the officers and crew thereof, and all other persons *not especially authorized by him* to go or remain on board thereof." (Emphasis added.) In short, the Act describes "what job must be done, who must do it, and what is the scope of his authority." *Bowles* v. *Willingham,* 321 U.S. 503, 515.

There can be no question that Congress could properly delegate to the President the responsibility for

determining when "the security of the United States is endangered." That determination, which depends in part on an assessment of intelligence reports and a weighing of foreign policy considerations, is peculiarly appropriate for the executive. *Zemel* v. *Rusk*, 381 U.S. 1, 17; *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304. In the circumstances, we submit Congress did not overstep established boundaries in leaving it to the President to decide when, and precisely how, to protect the vital merchant fleet, and the Nation's ports, from the dangers of subversion, espionage and sabotage.

II

THE SCREENING PROGRAM FOR MERCHANT SEAMEN DOES NOT INFRINGE CONSTITUTIONAL RIGHTS

We turn now to appellant's contention that the screening regulations and implementing procedures, if authorized, are unconstitutional because they infringe First Amendment rights, are impermissibly vague, fail to accord due process, constitute a bill of attainder, and operate *ex post facto*.

A. THE COMMANDANT'S INTERROGATORIES DID NOT INVADE FIRST AMENDMENT RIGHTS

In light of the procedural posture of this case at the administrative level, it is apparent that the basic question raised by this appeal is whether the Commandant may constitutionally defer action on appellant's application until he furnishes the requested

information.[6] As already noted, the Fifth Amendment privilege against self-incrimination is not involved.[7] Indeed, in refusing to answer the questions propounded, appellant rested on his contention that "it can be none of the government's business what he reads or what he thinks" (Exh. 5, J.A. 21–23), and he now argues that the First Amendment prohibits inquiries into an applicant's political beliefs or his organizational ties.

The governing principles were clearly set forth in *Barenblatt* v. *United States*, 360 U.S. 109, 126:

> * * * Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to

[6] As noted above, see p. 6 *supra*, appellant was specifically advised that his failure to respond would result in the application being held in abeyance. Compare *Konigsberg* v. *State Bar*, 353 U.S. 252, 261.

[7] Appellant never asserted that his refusal to answer the questions was based on his right under the Fifth Amendment to refuse to answer questions which might tend to incriminate him. Indeed, appellant freely admitted membership in the Communist Party. Thus, this case does not present the issue whether the assertion of the Fifth Amendment privilege in response to a question should be deemed a sufficient answer to require the Commandant to proceed with the further processing of the application. Compare *Blumenthal* v. *Federal Communications Commission*, 318 F. 2d 276 (C.A.D.C.), certiorari denied, 373 U.S. 951.

> bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.

We submit that the public interest in protecting the maritime industry from sabotage and subversion here outweighs the limited invasion of intellectual privacy which may result from the necessary screening program.

There can be no question that the federal government has a substantial interest in protecting our merchant fleet and harbor facilities from sabotage and subversive activities. From the beginning, shipping has been a matter of governmental concern, both because ocean commerce is vital to the welfare of the Nation and because of the importance of seapower as an agency of national defense. *E.g., Hume* v. *Moore, McCormack Lines,* 121 F. 2d 336, 345–346 (C.A. 2); Gilmore & Black, *The La wof Admiralty,* chapter XI (1957). Every aspect of shipping—including ship construction, preparation of ships for service, and procurement and qualifications of personnel—is closely regulated. Gilmore & Black, *supra,* 778–782. Appropriately, a government that regulates and subsidizes shipping, and provides training facilities for shipping personnel (see 46 U.S.C. § 1126), is concerned to protect shipping from subversive activity. And, certainly, the need for protective measures is not debatable. As one commentator has noted: "If the state of the world makes sabotage and espionage real dangers, the shipping industry is undoubtedly vulner-

able. Ships and docks are bottlenecks through which pass most military equipment bound overseas; and both are acutely flammable types of structures." Brown and Fassett, *op. cit. supra,* at 1165.

Given this substantial governmental interest in protecting shipping, the inquiries which are involved in the existing screening program are clearly justified. This Court has consistently recognized that a person's affiliation with the Communist Party and other subversive organizations is a proper matter for inquiry when there is a legitimate governmental interest to be protected. See, *e.g., Gerende* v. *Board of Supervisors,* 341 U.S. 56; *American Communications Assn.* v. *Douds,* 339 U.S. 382. Indeed, the public interest here is substantially greater than in many of the prior cases in which this Court has sustained the right of the government to make similar inquiries. See, *e.g., Konigsberg* v. *State Bar,* 366 U.S. 36, and *In Re Anastaplo,* 366 U.S.S. 82 (both involving relevance of Communist Party membership to character and fitness for practice of law); *Lerner* v. *Casey,* 357 U.S. 468 (involving a loyalty oath required as a precondition of employment by a municipal subway system); *Garner* v. *Board of Public Works of Los Angeles,* 341 U.S. 716 (loyalty oath as a prerequisite to employment in municipal civil service).

There can be no serious issue as to the relevancy of the questions asked the appellant. They concern his relationship with certain subversive organizations—plainly a material subject of inquiry. See *Barenblatt* v. *United States,* 360 U.S. 109, 127–132. As the Court

of Appeals for the District of Columbia Circuit said with respect to the employment of a former Communist as a radio-operator in the United States Merchant Marine in *Homer* v. *Richmond*, 292 F. 2d 719, 723:

> In view, especially at this period of our national life, of the sensitive nature of the positions involved—radio-telegraph operators on vessels of the Merchant Marine—positions closely associated with the nation's security, we think consideration of the ideological matters referred to [Communist Party membership, associations or activities] is permitted under the statute * * *.

See, also, *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666 (C.A.D.C.), certiorari denied, 364 U.S. 892; *Cronan* v. *Federal Communications Commission*, 285 F. 2d 288 (C.A.D.C.), certiorari denied, 366 U.S. 904; *Blumenthal* v. *Federal Communications Commission*, 318 F. 2d 276 (C.A.D.C.); *Ogden* v. *United States*, 303 F. 2d 724 (C.A. 9).

Nor was it improper for the Commandant to inquire into appellant's association with other organizations on the Attorney General's list. While it is true that in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, this Court found that the procedures for listing such organizations did not provide due process, the procedures were subsequently changed to comply with the Court's ruling. Executive Order No. 10450; see 28 C.F.R. 41.4. Since the organizations about which appellant was questioned were all designated pursuant to this revised procedure, there is no basis for a claim that they were improperly listed. At all events, the validity of the listing procedure is not de-

terminative of the Commandant's right to use the list as a starting place for his investigation. As the court stated in *McBride* v. *Roland,* 248 F. Supp. 459, 470 (S.D.N.Y.), affirmed, 369 F. 2d 65 (C.A.D.C.), certiorari denied *sub nom. McBride* v. *Smith,* 387 U.S. 932:

> The real answer to this afterthought is given by plaintiff himself when he points out that the difference between the use of the list in *McGrath* and here, is that in the former the list was used to establish a presumption while here it is used only as an element of evidence from which an inference ultimately was drawn. * * * The use made even if plaintiff could collaterally attack it, was not illegal.
>
> Nor does the Regulation create any presumption of disqualification from this list, but rather says that such information may be considered, which is what the Commandant did.

Since, as we have pointed out, the First Amendment did not preclude the Commandant from asking appellant relevant questions concerning his prior association with the Communist Party and other subversive organizations, there can be no constitutional bar to the Commandant's holding appellant's application in abeyance until those questions are answered. As stated in *Briehl* v. *Dulles,* 248 F. 2d 561, 574 (C.A.D.C.), reversed on other grounds *sub nom. Kent* v. *Dulles,* 357 U.S. 116:

> * * * There is nothing new or novel about requiring an applicant for a permit or a license to supply pertinent information under oath. Applicants for radio licenses and air route certificates must do so, and applicants for marriage licenses, voting privileges, and business

> permits must also. And, failing to supply the required data, the applicant cannot exercise his right.[8] * * *

See, also, *Konigsberg* v. *State Bar, supra,* and *In Re Anastaplo, supra; Borrow* v. *Federal Communications Commission, supra; Cronan* v. *Federal Communications Commission, supra;* and *Blumenthal* v. *Federal Communications Commission, supra.*

This Court's decision in *Speiser* v. *Randall,* 357 U.S. 513, is not to the contrary. That case involved a California law which provided that in order to qualify for a veteran's property-tax exemption the applicant must prove that he did not advocate the overthrow of the government of the United States. In that context, it was held improper to cast the burden on the applicant for the exemption. But the Court was careful to distinguish cases such as *Garner* v. *Board of Public Works, supra; Gerende* v. *Board of Supervisors, supra;* and *American Communications Assn.* v. *Douds, supra,* pointing out (357 U.S. 527) that

> [e]ach case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public.

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[8] The regulations of other government agencies, in addition to Federal Communications Commission and the Coast Guard, also make it clear that no consideration will be given to incomplete applications. See, for example, Federal Power Commission Regulations, 18 C.F.R. 4.31, and Civil Aeronautics Board Regulations, 14 C.F.R. 201.4(c)(8).

These same factors distinguish the present case from *Speiser*. Moreover, at this stage of the administrative proceedings, as we show presently, no issue of burden of proof is properly presented. Action on appellant's application has been withheld because he has refused to cooperate, not because he has failed to disprove a subversive character.

B. APPELLANT'S ATTACKS ON THE PROCEDURES FOR PROCESSING APPLICATIONS FOR SPECIAL VALIDATION ARE PREMATURE

Petitioner further contends that the screening procedures do not conform to the requirements of due process in that they allegedly place the burden on the applicant to establish that he is entitled to the special validation and permit the Commandant to consider matters which are not disclosed to the applicant. Closely related is the contention that the screening program is invalid because it allows the Commandant to base his determination that an applicant is not entitled to a special validation on a mere showing of membership in the Communist Party or other subversive organization, without a finding that the applicant is an active participant in the illegal functions of the particular organizations.

We submit that none of these claims is ripe for consideration at this point because appellant has not exhausted his administrative remedies. There is nothing in the current regulations to preclude the possibility that the processing of appellant's application will fully comply with the standards of due process. The regulations provide that if the application is denied appellant must be sent a notice which shall

> contain a statement of the reasons why the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States

> would not be inimical to the security of the United States. Such notice shall be as specific and detailed as the interests of national security shall permit and shall include pertinent information such as names, dates, and places in such detail as to permit reasonable answer. [33 C.F.R. 121.11.]

Thus, on the face of it, the applicant is likely to know with particularity the issues he may choose to contest on the hearing which is afforded him. And at that hearing he will be permitted to offer evidence and to cross-examine witnesses against him.[9]

Similarly, the significance of appellant's arguments concerning the burden of proof allegedly imposed on him cannot be assessed until after a determination has been made to either grant or deny the application. While the executive orders (33 C.F.R. 6.10–7) do provide that before the Commandant may issue a special validation he must be satisfied that the applicant's "character and habits of life * * * are such as to authorize the belief that [his] presence * * * on board would not be inimical to the security of the United States", this standard is not addressed to the question of burden of proof.[10] Insofar as the com-

[9] 33 C.F.R. 121.19(f) provides:

> * * * Every effort should be made to produce material witnesses to testify in support of the reasons set forth in the Notice of the Commandant, in order that such witnesses may be confronted and cross-examined by the applicant or holder.

[10] We note that the original wording of the Executive Order (Executive Order No. 10173, § 6.10–1, 15 Fed. Reg. 7005) provided that the application should be denied if the Commandant found that the employment *would* be inimical to security. It has been said however that "No overt change in policy * * * accompanied the adoption of [the present] formula in place of the original one * * *." Brown and Fassett *op. cit. supra*, p. 1175.

plaint is that the applicant is required to submit an application and furnish answers to interrogatories relevant to his qualifications, the procedure seems wholly appropriate. After all, it is the mariner who wishes to obtain a document and special emergency validation and the information relevant to his fitness is normally in his keeping. In this sense, the burden placed upon him is usual and necessary—no different from that imposed on every person seeking employment, public or private, and every applicant for any permit or license.

At all events, since the alleged procedural defects of which appellant complains may have no effect on the processing of his application, he should be required first to exhaust his administration remedies. *Lerner* v. *Casey,* 357 U.S. 468, 473. As this Court stated in *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752, 773–774:

> It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention. But, * * * a strong showing is required, both of inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process. * * *[11]

[11] In *Parker* v. *Lester,* 227 F. 2d 708 (C.A. 9), the court did not require exhaustion of administrative remedies by seamen who had been initially *denied* validated documents because un-

Finally, appellant's contention that the regulations are invalid because they permit the Commandant to take into consideration his participation in the Communist Party or other subversive organizations without a showing that he had a specific intent to further the illegal objects of the organization should await consideration until after the Commandant has passed upon the application. Certainly, there is no present basis for such a claim here. On the contrary, the action of the Commandant in appellant's case to date refutes the contention that mere membership in a proscribed organization will be considered grounds for disqualification. Appellant has already admitted membership in some of the organizations on the list, including the Communist Party; yet his application has not been denied. Indeed, it is for the purpose of gaining specific information concerning appellant's knowledge, commitment, and purpose in membership that interrogatories have been directed to him.

We do not say that the Commandant would be foreclosed from considering, as a relevant factor, membership less active than might be necessary to justify the

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der the Coast Guard regulations *then* in effect the court could say in advance that the reviewing boards were incapable of affording due process with respect to notice and an opportunity to be heard. As noted above, such is not the case here.

In *Graham* v. *Richmond*, 272 F. 2d 517 (C.A.D.C.), the court held that the Commandant could not hold the application in abeyance because the regulations did not so provide. *Id.* at 521. Subsequent to that case the regulations were amended to require the Commandant to hold the application in abeyance until the questions are answered. 33 C.F.R. 121.05.

imposition of criminal sanctions. Compare *Elfbrandt* v. *Russell*, 384 U.S. 11; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Scales* v. *United States*, 367 U.S. 203; and *Noto* v. *United States*, 367 U.S. 290. On the other hand, it is plain that the appellant has not automatically been disqualified because of mere past membership in the Communist Party. Where, in between, the line should be drawn presents difficult questions which, we submit, it is premature to decide on this barren record. Should appellant, at some later date, disclose the extent and character of his membership in listed organizations, it will be time enough to determine whether a basis for disqualification appears, if he is refused special validation on that account.

C. THE REGULATORY SCHEME IS NOT UNCONSTITUTIONALLY VAGUE

Appellant advances the further contention that the controlling standard for refusing special validation—whether the seaman's presence on board would be "inimical" to the security of the United States—is unconstitutionally vague. In our view, this argument was properly rejected here, as it was by the Second Circuit in *McBride* v. *Roland*, *supra*, 369 F. 2d at 69, where the court observed:

> Appellant's further contention that the regulation, in its use of the term "inimical," is unconstitutionally vague, is not well taken. In determining whether an applicant's presence would be not inimical the Commandant is permitted to consider certain types of information, including membership in an organization desig-

> nated by the Attorney General pursuant to Executive Order 10450 as amended. The Commandant has construed this to require "knowing" rather than "mere" membership, and such a construction in the context of "inimical" is surely not unreasonable. The term inimical itself has been used by the Court in a similar context. *Aptheker* v. *Secretary of State,* 378 U.S. at 511, 86 S. Ct. 1238. * * *

This Court's ruling in *Keyishian* v. *Board of Regents,* 385 U.S. 589, does not require a different holding. The program which was there invalidated—part of a "regulatory maze"—affected all public school teachers in New York and therefore directly trenched on academic freedom. Here, by contrast, we deal with the very real dangers of sabotage and subversion of vessels, harbors and ports—facilities vital to the commerce and defense of the Nation. Plainly, the same test is not appropriate. On the one hand, the need for broader protections here is obvious, and, on the other, the harm is less. In the present context, there can be no comparable "chilling effect."

D. THE REGULATIONS ESTABLISHING THE SCREENING PROGRAM DO NOT CONSTITUTE A BILL OF ATTAINDER OR *EX POST FACTO* LAW

One last contention deserves only brief answer: that the regulations constitute a bill of attainder and operate *ex post facto* in that they give the Commandant the right to exclude persons from serving as merchant seamen because of past membership in designated organizations. The argument is founded on an inaccurate factual premise—that the exclusion is based solely on past behavior.

The regulations provide that the Commandant shall make a determination relating to the present "character" of the applicant to determine whether his presence aboard a vessel would be inimical to the security of the United States. Of course, past conduct is relevant to a determination of present character and fitness for a sensitive position. But it does not follow that the applicant who is rejected, in part because his past illuminates his present character, is being punished for those past activities. See *Dent* v. *West Virginia,* 129 U.S. 114; *Hawker* v. *New York,* 170 U.S. 189; *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 87.

This case is wholly unlike *United States* v. *Brown,* 381 U.S. 437. There the statute made it a crime to serve as an officer of a labor organization for five years after membership in the Communist Party. That was direct punishment for past conduct, imposed by legislative action on a particular class of persons. Here, on the contrary, while past membership in the Communist Party may be considered as a relevant factor, it does not necessarily preclude a determination that the applicant is presently qualified for a special validation. Thus, unlike *Brown,* no disability arises *ipso facto* from the fact of membership in the Communist Party.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be affirmed.

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DECEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT OF THE UNITED STATES

No. 196.—October Term, 1967.

Herbert Schneider, Appellant, *v.* Willard Smith, Commandant, United States Coast Guard.	On Appeal From the United States District Court for the Western District of Washington.

[January 16, 1968.]

Mr. Justice Douglas delivered the opinion of the Court.

Appellant, who has served on board American-flag commercial vessels in various capacities, is now qualified to act as a second assistant engineer on steam vessels. But between 1949 and 1964 he was employed in trades other than that of a merchant seaman. In October 1964 he applied to the Commandant of the Coast Guard for a validation of the permit or license which evidences his ability to act as a second assistant engineer.

Under the Magnuson Act, 50 U. S. C. § 191 (b), the President is authorized, if he finds that "the security of the United States is endangered by . ... subversive activity," to issue rules and regulations "to safeguard against destruction, loss, or injury from sabotage or other subversive acts" all "vessels" in the territories or waters subject to the jurisdiction of the United States.[1]

[1] Section 191 provides in part:

"Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations—

"(a) to govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the United States, to inspect such vessels at any time, to place guards thereon, and, if necessary in his

President Truman promulgated Regulations, 33 CFR, pt. 6, which gives the Commandant of the Coast Guard authority to grant or withhold validation of any permit or license evidencing the right of a seaman to serve on a merchant vessel of the United States. § 6.10–3. He is directed not to issue such validation, unless he is satisfied that "the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States." § 6.10–1.

The questionnaire, which appellant in his application was required to submit, contained the following inquiry which he answered:

> "ITEM 4. Do you now advocate, or have you ever advocated, the overthrow or alteration of the Government of the United States by force or violence or by unconstitutional means?
>
> "Answer: No."

The questionnaire contained the following inquiries which related to his membership and participation in organizations which were on the special list of the Attorney General as authorized by Executive Order 10450, 18 Fed. Reg. 2489:

> "ITEM 5. Have you ever submitted material for publication to any of the organizations listed in Item 6 below?

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opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof.

"(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States."

"Answer. No.

"ITEM 6. Are you now, or have you ever been, a member of, or affiliated or associated with in any way, any of the organizations set forth below? [There followed a list of more than 250 organizations.]

"Answer. Yes.

"If your answer is 'yes,' give full details in Item 7.

"ITEM 7. (Use this space to explain Items 1 through 6. Attach a separate sheet if there is not enough space here.)

"Answer. I have been a member of many political & social organizations, including several named on this list.

"I cannot remember the names of most of them and could not be specific about any.

"To the best of my knowledge, I have not been a member of or participated in the activities of these organizations for ten years."

Upon receiving the questionnaire returned by the appellant, the Commandant advised him that the information was not sufficient and that answers to further interrogatories were necessary.[2]

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[2] "1. With respect to your statements above, furnish the following information, fully and honestly to the best of your ability:

"(a) List the names of the political and social organizations to which you belonged, and location.

"(b) Furnish approximate dates of membership.

"(c) Furnish full particulars concerning the extent of your activities and participation in the organizations (number and type of meetings/functions attended; positions or offices held; classes or schools attended; contributions made; etc.).

"(d) Your reason for discontinuing the membership.

"(e) Your present attitude toward the principles and objectives of the organizations.

"If your answer is 'YES' to the following Questions, *explain fully* in the space provided at the end of the Interrogatories:

"2. Are you now, or have you ever been a member of or affiliated

In reply, appellant, speaking through his counsel, admitted to the Commandant that he had been a member of the Communist Party as well as other organizations on the Attorney General's list and that he had subscribed to People's World. He said that he had joined the Party because of his personal philosophy and idealistic goals, but later quit it and the other organizations due to fundamental disagreement with Communist methods and techniques. But beyond that he said he would not answer because "it would be obnoxious to a truly free citizen to answer the kinds of questions under compulsion that you require." The Commandant declined to process the application further, relying upon 33 CFR § 121.05 (d)(2) which authorizes him to hold the application in abeyance, if an applicant fails or refuses to furnish the additional information.

Appellant thereupon brought this action for declaratory relief that the provisions of the Magnuson Act in question and the Commandant's actions thereunder were unconstitutional, praying that the Commandant be directed to approve his application and that he be enjoined

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with, in any way, the Communist Party, its Subdivisions, Subsidiaries, or Affiliates?

".....

(Answer 'Yes' or 'No.')

"3. Have you at any time been a subscriber to the 'People's World'?

"..... If your answer is 'Yes,' give dates.

(Answer 'Yes' or 'No.')

4. "Have you at any time engaged in any activities in behalf of the 'People's World'? .....

(Answer 'Yes' or 'No.')

"If your answer is 'Yes,' furnish details.

"5. What is your present attitude toward the Communist Party?

"6. What is your present attitude toward the principles and objectives of Communism?

"7. What is your attitude toward the form of Government of the United States?

from interfering with appellant's employment upon vessels flying the American flag.

A three-judge court was convened and the complaint was dismissed. 263 Fed. Supp. 496. The case is here on appeal, 28 U. S. C. § 1253. We postponed the question of jurisdiction to the merits. 389 U. S. 810.

We agree, as does appellee, that the case was one to be heard by a three-judge court and that accordingly we have jurisdiction of this appeal. For appellant did raise the question as to whether the statute was unconstitutional because of vagueness and abridgment of First Amendment rights and also questioned whether the power to install a screening program was validly delegated. A three-judge court was accordingly proper. *Baggett* v. *Bullitt*, 377 U. S. 360; *Zemel* v. *Rusk*, 381 U. S. 1.

The Magnuson Act gives the President no express authority to set up a screening program for personnel on merchant vessels of the United States. As respects "any foreign-flag vessels" the power to control those who "go or remain on board" is clear. 50 U. S. C. § 191 (a). As respects personnel of our own merchant ships, the power exists under the Act only if it is found in the power to "safeguard" vessels and waterfront facilities against "sabotage or other subversive acts," that is, under § 191 (b). The Solicitor General argues that the power to exclude persons from vessels "clearly implies authority to establish a screening procedure for determining who shall be allowed on board." But that power to exclude is contained in § 191 (a) which, as noted, applies "to foreign-flag vessels," while, as we have said, the issue tendered here must find footing in § 191 (b).[3]

[3] It is true that Senator Magnuson when discussing this measure stated that it "will give the President the authority to invoke the same kind of security measures which were invoked in World War I and World War II." 96 Cong. Rec. 10795. And from that Solicitor

We agree with the District Court that keeping our merchant marine free of saboteurs is within the purview of this Act. Our question is the much narrower one.

The Regulations prescribe the standards by which the Commandant is to judge the "character and habits of life" of the employee to determine whether his "presence on board" the vessel would be "inimical to the security of the United States":

> "(a) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means.
>
> "(b) Commission of, or attempts or preparations to commit, an act of espionage, sabotage, sedition or treason, or conspiring with, or aiding or abetting another to commit such an act.

General argues that the Act authorizes the broad sweeping personnel screening programs which were in force during World War II.

But this reference by Senator Magnuson apparently was to § 191 (a) which, as noted, covers "any foreign-flag vessels." When it came to § 191 (b) Senator Magnuson did not speak in terms of any screening program, but said:

"It [the bill] also has this purpose, which I think is a good one: As I have said before, the last stronghold of subversive activity in this country, in my opinion, or at least the last concentrated stronghold, has been around our water-fronts. It would be impossible for destruction to come to any great port of the United States, of which there are many, as the result of a ship coming into port with an atomic bomb or with biological or other destructive agency, without some liaison ashore. This would give authority to the President to instruct the FBI, in cooperation with the Coast Guard, the Navy, or any other appropriate governmental agency, to go to our water fronts and pick out people who might be subversives or security risks to this country. I think it goes a long way toward taking care of the domestic situation, as related to this subject, particularly in view of the large amount of talk we have had in the Senate within the past few days about Communists. The bill also protects that last loophole which is left, by which there might be some actual destruction along the shores of the United States." 96 Cong. Rec. 11321.

"(c) Performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the United States.

"(d) Deliberate unauthorized disclosure of classified defense information.

"(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended." 33 CFR § 121.03.

If we assume *arguendo* that the Act authorizes a type of screening program directed at "membership" or "sympathetic association," the problem raised by it and the Regulations would be kin to the one presented in *Shelton* v. *Tucker*, 364 U. S. 479, where a teacher to be hired by a public school of Arkansas had to submit an affidavit "listing all organizations to which he at the time belongs and to which he has belonged during the past five years." *Id.*, 481.

We held that an Act touching on First Amendment rights must be narrowly drawn so that the precise evil is exposed; that an unlimited and indiscriminate search of the employee's past which interferes with his associational freedom is unconstitutional. *Id.*, 487–490.

If we gave § 191 (b) the broad construction the Solicitor General urges, we would face here the kind of issue present in *Shelton* v. *Tucker, supra,* whether government can probe the reading habits, political philosophy, beliefs, and attitudes on social and economic issues of prospective seaman on our merchant vessels.

A saboteur on a mechant vessel may, of course, be dangerous. But no charge of appellant being a saboteur was made. Indeed, no conduct of appellant was at issue

before the Commandant. The propositions tendered in the complaint were (1) plaintiff is now and always has been loyal to the United States; (2) he has not been active in any organization on the Attorney General's list for the past 10 years; (3) he has never committed any act of sabotage or espionage or any act inimical to the security of the United States. Those propositions were neither contested by the Commandant nor conceded. He took the position that admission of evidence on those propositions was "irrelevant and immaterial."

We are loathe to conclude that Congress, in its grant of authority to the President to "safeguard" vessels and waterfront facilities from "sabotage or other subversive acts," undertook to reach into the First Amendment area. The provision of the Act in question, 50 U. S. C. § 191 (b), speaks only in terms of actions, not ideas or beliefs or reading habits or social, educational, or political associations.

The purpose of the Constitution and Bill of Rights, unlike more recent models promoting a welfare state, was to take government off the backs of people. The First Amendment's ban against Congress "abridging" freedom of speech, the right peacably to assemble and to petition, and the "associational freedom" (*Shelton* v. *Tucker, supra,* at 490) that goes with those rights create a preserve where the views of the individual are made inviolate. This is the philosophy of Jefferson that "[T]he opinions of men are not the object of civil government nor under its jurisdiction. . . . [I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order . . ."[4]

[4] A Bill for Establishing Religious Freedom, Jefferson Cyclopedia 976 (1900).

No act of sabotage or espionage or any act inimical to the security of the United States is raised or charged in the present case.

In *United States* v. *Rumely*, 345 U. S. 41, the Court construed the statutory word "lobbying" to include only direct representation to Congress, its members, and its committees, not all activities tending to influence, encourage, promote, or retard legislation. *Id.*, at 47. Such an interpretation of the statute, it was said, was "in the candid service of avoiding a serious constitutional doubt" (*ibid.*)—doubts that were serious "in view of the prohibition of the First Amendment." *Id.*, at 46.

The holding in *Rumely* was not novel. It is part of the stream of authority which admonishes courts to construe statutes narrowly so as to avoid constitutional questions.[5]

The Court said in *Rumely*, "Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits. Experience teaches us to tread warily in this domain." 345 U. S., at 46.

The present case involves investigation, not by Congress but by the Executive Branch, stemming from congressional delegation. When we read that delegation with an eye to First Amendment problems, we hesitate to conclude that Congress told the Executive to ferret out the ideological strays in the maritime industry. The words it used—"to safeguard . . . from sabotage or other subversive acts"—refer to actions, not to ideas or

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[5] *United States* v. *Delaware & H. Co.*, 213 U. S. 366, 407–408; *United States* v. *Harris*, 347 U. S. 612, 618, n. 6; *International Machinists* v. *Street*, 367 U. S. 740, 749; *Lynch* v. *Overholser*, 369 U. S. 705, 710–711; *United States* v. *National Dairy Corp.*, 372 U. S. 29, 32.

beliefs. We would have to stretch those words beyond their normal meaning to give them the meaning the Solicitor General urges. *Rumely*, and its allied cases, teach just the opposite—that statutory words are to be read narrowly so as to avoid questions concerning the "associational freedom" that *Shelton* v. *Tucker* protected and concerning other rights within the purview of the First Amendment.

Reversed.

MR. JUSTICE BLACK, while concurring in the Court's judgment and opinion, also agrees with the statement in MR. JUSTICE FORTAS' concurring opinion that the statute under consideration, if construed to authorize the interrogatories involved, is offensive to the First Amendment.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 196.—October Term, 1967.

Herbert Schneider, Appellant, v. Willard Smith, Commandant, United States Coast Guard. } On Appeal From the United States District Court for the Western District of Washington.

[January 16, 1968.]

Mr. Justice Fortas, concurring.

I concur in the opinion of the Court. Reversal is dictated because the interrogatories which petitioner refused to answer offend the First Amendment. *Shelton* v. *Tucker*, 364 U. S. 479 (1960). (They also pass the outermost bounds of reason. No agency may be permitted to require of a person, subject to heavy penalty, sworn essays as to his "attitude toward the form of government of the United States" or "full particulars," under oath, without time limit, as to contributions made and functions attended with respect to 250 organizations.) I agree that since Congress did not specifically authorize a personnel screening program, authority to impose procedures of the comprehensive type here involved, necessarily impinging on First Amendment freedoms, may not be inferred from dubious general language. The fault, however, is not that there was an inadequate or improper delegation, but that Congress did not authorize the type of investigation which was launched. Needless to say, Congress has constitutional power to authorize an appropriate personnel screening program and to delegate to executive officials the power to implement and administer it. See *United States* v. *Robel*, — U. S. — (1967).

Mr. Justice Stewart, agreeing with the separate views of Mr. Justice Fortas, concurs in the judgment.

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Mr. Justice White, with whom Mr. Justice Harlan joins, concurring in the result.

I agree with the Court that the Magnuson Act did not authorize the inqury undertaken by the Coast Guard Commandant and that therefore the judgment of the District Court must be reversed. I express no opinion as to the scope of inqury which Congress could constitutionally provide with respect to applicants for the position of merchant seaman.